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**ORIGINAL**

No. 9342

Docketed

**United States**  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

DALLAS MACHINE & LOCOMOTIVE WORKS,  
INC., a corporation,

Appellant,

vs.

WILLAMETTE-HYSTER COMPANY, a corpo-  
ration, and CLARK & WILSON LUMBER  
COMPANY, a corporation,

Appellees.

**Transcript of Record**

In Three Volumes

**VOLUME I**

Pages 1 to 406

Upon Appeal from the District Court of the United  
States for the District of Oregon.

**FILED**

JAN 23 1940





NO. 9342

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**Circuit Court of Appeals**  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Portland, Oregon,  
for Appellees.

---

In the District Court of the United States  
for the District of Oregon

July Term, 1935

Be It Remembered, That on the 3rd day of October, 1935, there was duly filed in the District Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to wit: [1\*]

---

\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States  
for the District of Oregon

Equity No. 9581

DALLAS MACHINE & LOCOMOTIVE WORKS,  
INC., a Corporation,

(Plaintiff)

vs.

WILLAMETTE-HYSTER COMPANY, a Corpo-  
ration, and CLARK & WILSON LUMBER  
COMPANY, a Corporation,

(Defendants)

### BILL OF COMPLAINT

The plaintiff respectfully shows and alleges:

#### I.

That the plaintiff is a corporation duly organized and existing under the laws of the State of Oregon, and has its principal place of business at Dallas, Oregon.

#### II.

That the defendant Willamette-Hyster Company during all the times of the wrongful acts herein complained of was and still is a corporation duly organized and existing under the laws of the State of Oregon, and is the same corporation as originally incorporated and existed under the corporate name Willamette-Ersted Company, having duly changed its name to Willamette-Hyster Company by supplementary articles; that the defendant has



its principal place of business in Portland within the District of Oregon.

III.

That the defendant Clark & Wilson Lumber Company is a corporation organized and existing under the laws of the State of Delaware, and is authorized to do business in this District of Oregon, and has a regular and established place of business at Linnton, Multnomah County, Oregon. [2]

IV.

This suit is brought for the infringement of letters patent of the United States, hereinafter specified, duly granted for an invention and to restrain the defendants and each of them, from further infringement of said letters patent, and to require the defendants and each of them, to account for the profits made by them respectively by said infringement, and also to recover the damages sustained by the plaintiff by reason of the infringements, all committed within the District of Oregon.

V.

That prior to March 30, 1922, Carl F. Gerlinger, then and still residing in Dallas, in the State of Oregon, was the original, first and sole inventor of a new and useful improvement in Lumber Carrier.

That said improvement in Lumber Carrier was not known or used by others before the invention thereof by said Carl F. Gerlinger, and that on March 30, 1922, the said Carl F. Gerlinger duly

filed an application for Letters Patent of the United States on said invention, such application being dated March 30, 1922, and bearing Serial No. 548,177. That at the time of the filing of said application for patent the said invention had not been patented or described in any printed publication in this or any foreign country before the invention of said improvement by the said Carl F. Gerlinger, or more than two years prior to his said application, and had not been patented in any country foreign to the United States on an application filed by said Carl F. Gerlinger or his legal representatives or assigns more than twelve months before his said application, and said improvement was not in public use or on sale in the United States for more than two years prior to his said application.

## VI.

That thereupon, on due proceedings had by the said Carl [3] F. Gerlinger, and due compliance by him with all requirements of the Patent Statutes, on May 29, 1923, Letters Patent of the United States, bearing that date and No. 1,457,025, were duly granted to said Carl F. Gerlinger for said invention, whereby it is vested in him, his legal representatives and assigns for the term of seventeen years thereafter the exclusiv right to make, use and vend the said patented improvement in Lumber Carrier thruout the United States and the territories thereof. That the said Letters Patent at all times hereinafter mentioned, was and still is in full force

and effect. That a copy of said Letters Patent is attached hereto as Exhibit "A" of this Complaint, and the original Letters Patent is ready to be produced in Court in this cause.

## VII.

That thereafter the entire right, title and interest in and to said Letters Patent were, for value received by the said Carl F. Gerlinger, duly sold, assigned and transferred unto the above named plaintiff, by an instrument in writing, dated the 2nd day of July, 1928; such transfer including an assignment of all damages accruing by the infringement of said Letters Patent, and the right to sue for and collect said damages; and the plaintiff is still the exclusive owner of said Letters Patent together with the rights to recover damages for the infringement thereof. And said assignment was duly recorded in the Transfers of Patents of the United States Patent Office on July 6, 1928, in Liber N135 at Page 43, and the original assignment is ready to be produced in Court.

## VIII.

That since the granting to said Carl F. Gerlinger of said patent, he, and his said assignee, the Dallas Machine & Locomotive Works, Inc., engaged extensively in the making and selling of Lumber Carriers embodying said patented invention, and all such Lumber Carriers were duly marked with the notice required by law as [4] to the same being patented;



and the fact of said improvements being patented is well known to the trade in general, and the defendant Willamette-Hyster Company also had direct and actual knowledge of said Letters Patent. Furthermore, the said Carl F. Gerlinger and his said assignee, Dallas Machine & Locomotive Works, Inc., invested large sums of money in the manufacture and sale of lumber carriers embodying said patented improvement, and in advertising and introducing said patented improvement to the public, and to lumber mills in particular; and in consequence the patented improvements described by said Letters Patent have become widely and favorably known to the public, and persons engaged in operating lumber mills, and the said Carl F. Gerlinger and his said assignee, Dallas Machine & Locomotive Works, Inc. have sold a large number of lumber carriers embodying said improvement, and the public in general has acknowledged and acquiesced in the said exclusive rights granted by said Letters Patent; and the plaintiff would continue to make substantial profits under its said exclusive patent rights but for the infringement of said Letters Patent by the defendants, severally and jointly, hereinafter complained of. That the plaintiff is prepared to supply all demand for lumber carriers embodying said patented improvements.

## IX.

That the defendants, and each of them, in violation of the exclusive rights of the plaintiff in and



under said Letters Patent, and within six years prior to the commencement of this suit, infringed said Letters Patent as follows:

That the defendant Willamette-Hyster Company, notwithstanding its knowledge of said Letters Patent, and in defiance thereof, did wilfully and deliberately manufacture lumber carriers embodying said patented improvements, and did sell the same to lumber mills and other users, including the defendant Clark & Wilson Lumber Company; and the defendant Clark & Wilson Lumber [5] Company, confederating with the defendant Willamette-Hyster Company, have used, and still continue to use, lumber carriers embodying said patented improvements which it obtained from the defendant Willamette-Hyster Company without the license of the plaintiff, and in violation of the plaintiff's exclusive rights under said Letters Patent. Whereby plaintiff has been, and still is, and will be, as long as said infringements continue, deprived of the just profits which it otherwise would make under said Letters Patent; and besides is greatly and irreparably damaged and injured in the premises by the defiance of plaintiff's said exclusive rights under said Letters Patent.

#### X.

That furthermore, the defendants and each of them, by their said infringement, have respectively made, and continue to make substantial profits, as plaintiff is informed and verily believes, which be-

long to the plaintiff, the amount of which profit plaintiff, however, cannot ascertain except by requiring the defendants to account under the order and direction of this Court.

## XI.

That, furthermore, the defendants, by their said wrongful acts, are encouraging others to infringe upon said Letters Patent, and therefore plaintiff has been, and still is, and will be further irreparably damaged by the so induced infringement of said Letters Patent.

That in order to adequately protect the rights of plaintiff in the premises it is necessary that the defendants and each of them, their officers, employees, agents and confederates be enjoined pending this suit, and perpetually by the final decree of this Court, from the further infringement of said Letters Patent, and from aiding or abetting in any way such infringement.

Wherefore plaintiff prays for a decree:

1. Adjudging said Letters Patent to be valid, and that the entire right, title and interest thereof is vested in the [6] plaintiff.

2. That the defendants and each of them be adjudged to infringe upon said Letters Patent, and that each of the defendants be enjoined pending this suit, and perpetually by the final decree herein entered.

3. That a reference be had to a Master to take and report an account of the profits made by the

defendants respectively, and the damages and losses sustained by the plaintiff by reason of said infringement of said defendants; and that the plaintiff may have judgment for its losses and damages so found, together with such increase of its damages as by law provided, and as the Court may deem just; and that the plaintiff have the costs and disbursements of this suit, and such other and further relief as may be just.

DALLAS MACHINE & LOCO-  
MOTIVE WORKS, INC.,

Plaintiff

By: CARL F. GERLINGER

President

THEODORE J. GEISLER

302 Platt Building

Portland, Oregon

Attorney for Plaintiff

[Verification]

Exhibit "A" to Bill of Complaint, being Exhibit "2" introduced at trial is here omitted.

[Endorsed]: Filed October 3, 1935. [7]

---

And Afterwards, to wit, on the 22nd day of November, 1935, there was duly Filed in said Court, a Motion for bill of particulars, in words and figures as follows, to wit: [8]

[Title of District Court and Cause.]

### MOTION FOR BILL OF PARTICULARS

Now come Willamette-Hyster Company, a corporation, and Clark & Wilson Lumber Company, a corporation, defendants above-named, and move the above-entitled Court for an order requiring plaintiff in the above-entitled cause to furnish the defendants with the following:

1. A statement of what claim or claims of Letters Patent No. 1,457,025 sued upon in the bill of complaint herein will be relied upon by the plaintiff at the trial of said cause and then be charged to have been infringed by defendants.

2. With respect to each of the claims to be relied upon by plaintiff at the trial a statement enumerating which, if any, of the elements of said claims plaintiff contends are found in defendants' device; and pointing out by reference characters applied to a drawing, photograph or cut of the device complained of where each of such elements is found in such device.

The ground for this motion is that the bill of complaint herein is vague, indefinite and uncertain in the particulars above specified, and that the defendants cannot intelligently prepare [9] for the trial of said cause unless said particulars are furnished.

Said motion will be based upon all of the papers and pleadings on file in said cause; upon Equity



Rule 20 and such evidence, oral or documentary, as may be adduced at the hearing of said motion.

CHAS. M. FRYER

ALFRED C. AURICH

AUSTIN F. FLEGEL, JR.,

Solicitors & Counsel for  
Defendants.

[Endorsed]: Filed November 22, 1935. [10]

---

And Afterwards, to wit, on the 27th day of November, 1935, there was duly Filed in said Court, Plaintiff's response and compliance with Defendants' motion for bill of particulars, in words and figures as follows, to wit: [11]

[Title of District Court and Cause.]

PLAINTIFF'S RESPONSE AND COMPLI-  
ANCE WITH DEFENDANTS' MOTION  
FOR BILL OF PARTICULARS.

In response to the defendants' motion requiring the plaintiff to furnish defendants with certain particulars hereinafter set forth, plaintiff now furnishes these particulars as follows:

1. A statement of what claim or claims of Letters Patent No. 1,457,025 sued upon in the bill of complaint herein will be relied upon by the plaintiff at the trial of said cause and then be charged to have been infringed by defendants.

Plaintiff states that claim 4 of the patent in suit, No. 1,457,025, will be relied on.

As to Particular 2. With respect to each of the claims to be relied upon by plaintiff at the trial a statement enumerating which, if any, of the elements of said claims plaintiff contends are found in defendants' device; and pointing out by reference characters applied to a drawing, photograph or cut of the device complained of where each of such elements is found in such device.

Plaintiff states that the combination described and covered by said claim 4 of the plaintiff's patent is contained in the certain lumber carriers manufactured and sold by defendant Willamette-Hyster Company, a corporation, and used by defendant Clark & Wilson Lumber Company, a corporation, is illustrated and described by the printed "Service Manual" issued by defendant Willamette-Hyster Company, a corporation, to purchasers and users [12] of its said lumber carriers. Said manual being entitled:

“Service Manual  
Complete Repair Parts List  
Instructions for Maintenance and Operation  
Assembly Drawings  
Cut

Willamette  
“Utility” Carriers  
Type C  
Willamette-Ersted Company  
Factory and Main Office  
Portland, Oregon, U. S. A.

Peoria, Illinois	New York, N. Y.
837 South Washington St.	126 Liberty St.”

(The corporate name of defendant Willamette-Hyster Company, a corporation, being formerly Willamette-Ersted Company, as set forth in the Complaint herein.)

That the said “Service Manual” at pages 1, 2 and 3 describes, and at pages 2 and 3 illustrates devices embodied in the lumber trucks manufactured and sold by the Willamette-Hyster Company which are the same in purpose and operation as those described by said claim 4 of plaintiff’s said patent, namely,

A lumber carrier comprising a frame, load lifting means mounted therein,

means for transmitting motion from a source of power to the load lifting means comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction,

means for manually moving the clutch to operative position,

automatic means for moving the clutch to neutral position upon a movement of the load lifting means to a predetermined extent in either direction, [13] and means for braking the transmitting means whenever the clutch is moved to neutral position.

With this information plaintiff believes it has fully furnished defendants with the particulars they have required in order to enable them respectively to answer the Bill of Complaint herein.

Dated November 26, 1935.

THEODORE J. GEISLER

Attorney for Plaintiff.

[Endorsed]: Filed November 27, 1935. [14]

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And Afterwards, to wit, on the 12th day of December, 1935, there was duly Filed in said Court, an Answer to bill of complaint, in words and figures as follows, to wit: [15]

[Title of District Court and Cause.]

#### ANSWER TO BILL OF COMPLAINT

Now come Willamette-Hyster Company, a corporation, and Clark and Wilson Lumber Company, a corporation, defendants above named and answering the bill of complaint on file in the above entitled cause, admit, deny and allege as follows:



I.

Answering Paragraph I of said bill of complaint, said defendants allege that they are without knowledge as to the allegations contained in said paragraph.

II.

Answering Paragraph II of said bill of complaint, said defendants deny that the defendant Willamette-Hyster Company, during all of the times mentioned in said bill of complaint, was a corporation duly organized and existing under the laws of the State of Oregon, but said defendants admit the remaining allegations contained in said paragraph.

III.

Answering Paragraph III of said bill of complaint, said defendants admit the allegations contained in said paragraph. [16]

IV.

Answering Paragraph IV of said bill of complaint, said defendants admit that this suit is brought for the alleged infringement of letters patent of the United States, specified in said bill of complaint, and to restrain the defendants and each of them, from further alleged infringement of said letters patent, and to require the defendants and each of them to account for the profits made by them respectively by said alleged infringement and also to recover the damages sustained by the plaintiff by reason of the alleged infringement, all alleged to be committed within the District of Oregon, but

said defendants deny that said letters patent were duly granted for an or any invention.

## V.

Answering Paragraph V of said bill of complaint, said defendants deny that prior to March 30th, 1922, or at any other time or at all, Carl F. Gerlinger, was the original first, sole or any inventor of a new or useful or any improvement in Lumber Carrier.

Said defendants deny that said alleged improvement in Lumber Carrier was not known or used by others before the alleged invention thereof by said Carl F. Gerlinger, and deny that on March 30, 1922, the said Carl F. Gerlinger duly filed an application for letters patent of the United States on said alleged invention, such application being dated March 30, 1922, and bearing Serial No. 548,177.

Said defendants deny that at the time of the filing of said application for patent, the said alleged invention had not been patented or described in any printed publication in this or in any foreign country before the alleged invention of [17] said alleged improvement by said Carl F. Gerlinger, or more than two years prior to his said application; said defendants deny that said alleged invention had not been patented in any country foreign to the United States on an application filed by said Carl F. Gerlinger or his legal representatives or assigns more than twelve months before his said application, and said defendants deny that said alleged improvement was not in public use or on sale in the United

States for more than two years prior to his said application.

## VI.

Answering Paragraph VI of said bill of complaint, said defendants deny that thereupon on due proceedings had by the said Carl F. Gerlinger or due or any compliance by him with all or any requirements of the Patent Statutes, on May 29, 1923, letters patent of the United States, bearing that date and No. 1,457,025, was duly granted to said Carl F. Gerlinger for the said alleged invention, whereby it is vested in him, his legal representatives and assigns for the term of seventeen years thereafter the exclusive right to make, use and vend the said alleged patented improvements in Lumber Carrier throughout the United States and territories thereof. Said defendants deny that said letters patent at all times thereafter mentioned, was or still is in full force and effect.

## VII.

Answering Paragraph VII of said bill of complaint, said defendants allege that they are without knowledge as to the allegations contained in said paragraph.

## VIII.

Answering Paragraph VIII of said bill of complaint, said defendants deny that since the granting to said Carl F. [18] Gerlinger of said patent, he, or his alleged assignee, the Dallas Machine & Locomotive Works, Inc., engaged extensively or at all in the making or selling of Lumber Carriers em-



bodying said alleged patented invention; deny that all or any such Lumber Carriers were duly or at all marked with the notice required by law as to the same being patented; deny that the fact of said alleged improvements being patented is well or at all known to the trade in general, and deny that the defendant Willamette-Hyster Company also had direct or actual or any knowledge of said letters Patent. Said defendants deny that said Carl F. Gerlinger or his alleged assignee, Dallas Machine & Locomotive Works, Inc., invested large or any sums of money in the manufacture or sale of Lumber Carriers embodying said alleged patented improvement or in advertising or introducing said alleged patented improvements to the public or the lumber mills in particular, or otherwise or at all; deny that in consequence the alleged patented improvements described by said letters patent have become widely or favorably or at all known to the public or persons engaged in operating lumber mills; deny that said Carl F. Gerlinger or his alleged assignee Dallas Machine & Locomotive Works, Inc. have sold large or any number of Lumber Carriers embodying said alleged improvement and deny that the public in general or at all has acknowledged or acquiesced in said alleged exclusive rights granted by said letters patent. Said defendants deny that the plaintiff would continue to make substantial or any profits under its said alleged exclusive patent rights but for the alleged infringement of said letters patent by the defendants, severally or jointly, complained



of in said bill of complaint, and said defendants deny that plaintiff is prepared to supply all or any demand for lumber carriers [19] embodying said alleged patented improvements.

### IX.

Answering Paragraph IX of said bill of complaint, said defendants deny that they or each of them in violation of the alleged exclusive rights of the plaintiff in or under said letters patent or within six years prior to the commencement of this suit, or otherwise or at all have infringed said letters patent.

Said defendants deny that defendant Willamette-Hyster Company notwithstanding its alleged knowledge of said letters patent or in defiance thereof or otherwise or at all, wilfully or deliberately or at all manufactured lumber carriers embodying said alleged patented improvements, or sold the same to lumber mills or other users, including the defendant Clark & Wilson Lumber Company, or otherwise or at all; said defendants deny that the defendant Clark & Wilson Lumber Company, confederating with the defendant Willamette-Hyster Company, or otherwise or at all, have used or still continue to use lumber carriers embodying said alleged patented improvements which it obtained from the defendant Willamette-Hyster Company without the license of the plaintiff or in violation of said plaintiff's alleged exclusive rights under said letters patent, or otherwise or at all. Said defendants deny that thereby plaintiff has been or still is or will be, as

long as said alleged infringements continue, or at all, deprived of the just or any profits which it otherwise would make under said letters patent; and deny that plaintiff is greatly or irreparably or at all damaged or injured in the premises by the alleged defiance of plaintiff's said alleged exclusive rights under said letters patent, and in that regard said defendants allege that they have never infringed [20] said letters patent or any claim or claims thereof at any time or any place and have not threatened to infringe the same and do not intend to infringe the same.

Said defendants further allege that they have never at any time or at any place made, used or sold, or caused to be made, used or sold, any lumber carrier containing or embracing the alleged invention disclosed or claimed in said letters patent or any device containing any of the combinations of elements respectively set forth in any of the claims of said letters patent No. 1,457,025.

#### X.

Answering Paragraph X of said bill of complaint, said defendants deny that they or either of them by their said alleged infringement or otherwise or at all, have respectively made or continue to make substantial or any profit which belongs to plaintiff, the amount of which profit plaintiff cannot ascertain except by requiring the defendants to account under the order and direction of this Court, or otherwise or at all.

## XI.

Answering Paragraph XI of said bill of complaint, said defendants deny that by their said alleged wrongful acts, they are encouraging others to infringe upon said letters patent, or therefore plaintiff has been, or still is, or will be further irreparably or at all damaged by the so alleged induced infringement of said letters patent.

Said defendants deny that in order to adequately or at all protect the rights of plaintiff in the premises it is necessary that the defendants or either of them, their officers, employees, agents or confederates be enjoined pending this suit, or perpetually by the final decree of this Court, from the [21] further alleged infringement of said letters patent, or from aiding or abetting in any way such alleged infringement.

## XII.

For a further and separate defense, said defendants allege that by reason of the state of the prior art existing at the time of the said alleged invention by said Carl F. Gerlinger of the thing alleged to be described and patented in and by said letters patent No. 1,457,025, the said thing was not an invention and did not require the or any exercise of the inventive faculty for its production, and was not patentable, for which reason the said alleged letters patent No. 1,457,025 is null, void and of no effect.

## XIII.

For a further and separate defense said defendants allege that the said Carl F. Gerlinger was not the original or first or sole or any inventor or discoverer of the alleged invention alleged to be patented in and by the said letters patent No. 1,457,025, or of any material or substantial part thereof, but long prior to the alleged invention thereof by the said Carl F. Gerlinger and more than two years prior to the filing of the application for said letters patent, the said alleged invention and every material and substantial part thereof, had been shown, described and patented in and by each of the following letters patent of the United States of America and foreign countries, and had been invented, known, publicly used and on sale and sold by each of the patentees, and at the places respectively named in each of said letters patent, and each of said patentees was the first and original inventor thereof, and at all times was using reasonable diligence in adapting and perfecting the same, and the respective places of residence of said patentees are respectively set forth in said letters patent, to-wit: [22]

Patentee	Number	Dates
Van Emon, et al	43,451	July 5, 1864
Herdman	507,617	Oct. 31, 1893
Bouck	722,444	March 10, 1903
Carr	1,407,124	Feb. 21, 1922



Amendment pursuant to stipulation filed March 6, 1936.

G. H. MARSH,  
Clerk.

Patentee	Number	Date
Towson, et al	1,337,804	April 20, 1920
Cochrane	1,399,543	Dec. 6, 1921
Wright	1,404,419	Jan. 24, 1922
Hertner	1,505,889	Aug. 19, 1924

and other letters patent of the United States of America and foreign countries, the exact numbers, dates and names of the patentees of which are at present unknown to defendants, but which numbers, dates and names defendants reserve leave to insert in this Answer by amendment thereto, when ascertained.

#### XIV.

For a further and separate defense, said defendants allege that more than two years prior to the filing of the application for said letters patent No. 1,457,025, and prior to the alleged invention by said Carl F. Gerlinger of the alleged invention alleged to be claimed therein, said alleged invention had been in public use and had been on public sale and sold, and had been known and used by Ross Carrier Company at Benton Harbor, Michigan and by various other persons, firms and corporations at various and sundry places in the United States of America, the exact names and locations of which are at present unknown to the defendants, but which names and places defendants reserve leave

to insert in this Answer by amendment thereto when ascertained.

#### XV.

For a further and separate defense, said defendants allege that more than two years prior to the filing of the application for said letters patent No. 1,457,025, the alleged invention claimed therein had been disclosed, described and [23] set forth in various and sundry printed publications, the exact names of which are at present unknown to the defendants, but which names defendants reserve leave to insert in this Answer by amendment thereto when ascertained.

#### XVI.

For a further and separate defense, said defendants allege that said letters patent No. 1,457,025 is invalid and void for the reason that Carl F. Gerlinger, the alleged patentee thereof was not the original or first or any inventor thereof, in that the same and all material and substantial parts thereof were invented prior to the alleged invention by said patentee, by the following named persons, viz:

G. A. Grab, residing at Portland, Oregon,  
H. B. Ross, residing at Benton Harbor, Michigan,  
Henry Hartwig, residing at Sandy, Oregon,  
who at all times were using reasonable diligence in adapting and perfecting the same.

#### XVII.

For a further and separate defense, said defendants allege that said letters patent No. 1,457,025 is

invalid and void for the reason that for the purpose of deceiving the public, the description and specification filed by said Carl F. Gerlinger in the Patent Office of the United States and embraced in his application upon which said letters patent was granted and issued, and the said application were made to contain less than the whole truth relative to his alleged invention or discovery, and therefore said letters patent No. 1,457,025 and each and all of the claims thereof, are void and invalid.

### XVIII.

For a further and separate defense, said defendants [24] allege that during the prosecution of the application upon which said letters patent No. 1,457,025 was issued, the Patent Office rejected each and all of the broad claims thereof, and such rejection was acquiesced in by the said Carl F. Gerlinger, and such claims were cancelled and said letters patent was issued without embracing any but narrow claims, limited to the precise details disclosed and described in the specification of the said letters patent, for which reason plaintiff herein is estopped from contending and maintaining that the claims in said letters patent No. 1,457,025 are or that any of them is of a scope as broad as or broader than said rejected and cancelled claims or of a scope sufficiently broad to cover or include the machine complained of by plaintiff herein as infringing said letters patent No. 1,457,025.



## XIX.

For a further and separate defense, said defendants allege that said invention sought and attempted to be described, patented and claimed in and by said letters patent No. 1,457,025 is of no utility whatever and that the same was never put into practical or any use, and cannot be practiced by anyone, and that said alleged invention is without utility, inoperative and worthless, for which reason said letters patent No. 1,457,025 and each and all of the claims thereof are null, void and of no effect.

## XX.

For a further and separate defense defendants allege that Lumber Carriers substantially identical in construction and operation with the Lumber Carriers complained of herein, have been made and sold and widely used throughout the United States of America for more than six years prior to the bringing [25] of this suit, and at all of such times plaintiff and its predecessors in interest have had full knowledge of the construction and operation of such Lumber Carriers and of said wide-spread manufacture, use and sale thereof, but neither plaintiff nor its predecessors in interest have at any time prior to the bringing of this suit asserted or attempted to enforce any alleged rights under the patent in suit with respect to any of such long-continued manufacture, use or sale of said Lumber Carriers; and throughout all of such time plaintiff and its predecessors in interest have continually



recognized and acquiesced in the right of defendants and of the public to make, use and sell such Lumber Carriers and have thereby encouraged the manufacture, use and sale of such Lumber Carriers, and the investment by defendants and others of large sums of money in making, using and selling such Lumber Carriers; and in reliance upon such conduct of plaintiff and its predecessors in interest defendants did so invest large sums of money for which reason plaintiff is guilty of laches with respect to the alleged cause of action attempted to be stated in the bill of complaint herein and is estopped to assert any of its alleged rights under the patent in suit against defendants, or either of them.

Wherefore, defendants pray that plaintiff take nothing by this suit, and that the bill of complaint herein be dismissed and that the defendants recover their costs herein incurred.

WILLAMETTE-HYSTER  
COMPANY,

a corporation,

CLARK & WILSON LUMBER  
COMPANY,

a corporation,

By CHAS. M. FRYER

Its Attorney

CHAS. M. FRYER

ALFRED C. AURICH

AUSTIN F. FLEGEL, JR.

Solicitors & Counsel for Defendant

[Endorsed]: Filed December 12, 1935 [26]

And Afterwards, to wit, on the 21st day of December 21, 1935, there was duly Filed in said Court, Plaintiff's Motion for bill of particulars, in words and figures as follows, to wit: [27]

[Title of District Court and Cause.]

PLAINTIFF'S MOTION FOR BILL OF  
PARTICULARS

The plaintiff in the above entitled cause now moves the Court under Equity Rule 20 for an Order requiring the defendants, respectively, to furnish the plaintiff with the following further and better particulars of certain matters alleged in the defendants' Answer, viz:

1.

Referring to paragraph XII (page 7) of the Answer:

State what the prior art alleged in said paragraph consists of, whether

- (a) a publication;
- (b) a domestic or foreign patent;
- (c) or alleged prior knowledge and/or use, and in the latter case defendants further to state
- (d) when and where, and by whom, and in whose presence, such alleged prior knowledge or use occurred.

2.

Referring to paragraph XIII (page 7) of the Answer:

- (a) State the number, date and name of the particular foreign patent defendants intended to refer

to in this paragraph, in line 11, all the patents cited being United States patents;

(b) State which of the patents alleged in paragraph XIII (page 8) of the Answer will be offered in evidence by defendants on the trial of this case merely to illustrate the prior state of the art, and which thereof in support of defendants contention of the anticipation of the patent in suit. [28]

3.

With reference further to paragraph XIII (page 8, line 6) of the Answer:

State as nearly as defendants can at this time the numbers, dates or names of the patentees of other letters patents of the United States and/or foreign countries referred to by the defendants, but "the exact numbers, dates and names of the patentees of which are at present unknown to defendants".

4.

Referring to paragraph XIV (page 8) of the Answer:

State as nearly as defendants can at this time, the names and locations of the "various other persons, firms, and corporations at various and sundry places in the United States of America" by whom, for "more than two years prior to the filing of the application for said letters patent No. 1,457,025 \* \* \* said alleged invention had been in public use and had been on public sale and sold", but "the

exact names or locations of which are at present unknown to the defendants”.

## 5.

Referring to paragraph XV, state as nearly as defendants can at this time the names of the “various and sundry printed publications” which “disclosed, described, and set forth” the invention covered by the patent in suit and “more than two years prior to the filing of the application for said patent”, but “the exact names of which (publications) are at present unknown to the defendants”.

## 6.

Referring to paragraph XVI, (page 9) of the Answer:

(a) State when each of the persons named in such paragraph invented the improvement in lumber carriers set forth in the Complaint in suit.

(b) State where such alleged invention occurred.

[29]

(c) State, with respect to each of said persons, whether the alleged prior invention covered the entire combination set forth by claim 4 of plaintiff's patent in suit, or only a particular part or element of said combination; and in the latter event, describe such particular part or element.

## 7.

Referring to paragraph XVII, (page 9) of the Answer:



(a) State what the alleged part of plaintiff's invention omitted from its said letters patent is.

(b) State whether the alleged omission was merely a detail of construction.

(c) State whether the alleged omission makes the improvement in Lumber Carriers described by plaintiff's patent inoperative.

8.

Referring to paragraph XX, (page 10) of the Answer and the allegation therein "that Lumber Carriers substantially identical in construction and operation with the Lumber Carriers complained of herein" (presumably designating the Lumber Carriers described by the patent in suit) "have been made and sold and widely used throughout the United States of America for more than six years prior to the bringing of this suit":

(a) State specifically by whom, when, and where such alleged prior making and/or selling occurred;

(b) State specifically by whom, when, and where the prior use occurred.

9.

With further regard to paragraph XX of defendants' Answer, and particularly in reference to the allegation therein that during the said alleged prior making and selling of said lumber carriers the "plaintiff and its predecessors in interest have continually recognized and acquiesced in the right of the defendants and of the public to make, use and sell such lumber carriers": [30]

State specifically what the alleged recognition and/or acquiescence on the part of plaintiff and its predecessors in interest consisted of, that is,—

(a) Whether such alleged recognition and acquiescence will be predicated upon the failure of plaintiff, and/or its predecessors in interest, to take any action against said makers and users.

(b) Whether some act, and/or conduct of the plaintiff, and/or its predecessors, was relied on by defendants, or either thereof, and in such event state the particulars fully of such act and/or conduct.

Referring further to paragraph XX (page 11, lines 14 et seq. particularly) alleging that “in reliance upon such conduct of plaintiff and its predecessors in interest defendants did so invest large sums of money”, state for what purpose, and when, and where, the defendants, respectively, invested large sums of money in reliance upon any act or conduct by the plaintiff, or its predecessors in interest, in the premises.

\* \* \* \* \*

That the reason for this Motion is that the joint Answers of the defendants with regard to the particular allegations thereof above referred to are so vague, indefinite and uncertain that the plaintiff is not informed of the true nature of the defendants' defense; and, therefore, cannot safely prepare for the trial of said cause unless the particulars hereinabove requested are furnished to plaintiff by defendants.

This Motion will be based upon the pleadings in the above entitled cause and such evidence, oral or documentary, as may be introduced at the hearing of this motion.

And plaintiff further moves that plaintiff's time in which to move for leave to file Interrogatories to be answered by an officer of the defendant corporations, respectively, under [31] Equity Rule 58, be extended by the order of this Court for Twenty (20) days after this Motion for Bill of Particulars is decided by the Court; and, if allowed, then for Twenty (20) days from the date on which the defendants furnish the plaintiff with such particulars as the Court may direct.

Dated December 20, 1935.

THEODORE J. GEISLER

Attorney for Plaintiff

To:

MESSRS. CHAS. M. FRYER,  
ALFRED C. AURICH, and  
AUSTIN F. FLEGEL, JR.

Solicitors & Counsel for Defendant

[Endorsed]: Filed December 21, 1935. [32]

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And Afterwards, to wit, on Monday, the 2nd day of March, 1936, the same being the 1st Judicial day of the Regular March, 1936 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [33]

[Title of District Court and Cause.]

ORDER ALLOWING MOTION FOR  
BILL OF PARTICULARS.

The plaintiff's motion for an order requiring the defendants to serve further and better particulars of certain matters alleged in defendants' Answer came on to be heard and was argued by counsel for the respective parties and thereupon, on consideration thereof, it is Ordered as follows:

That paragraphs 1, 2(a), 3, 4 and 5 be denied, and that paragraphs 2(b), 6, 7, 8 and 9 be and the same are hereby allowed.

Further Ordered that defendants serve on plaintiff and file with the Clerk of this Court a Bill of Particulars required by said paragraphs 2(b) 6, 7, 8 and 9 of said Motion for Bill of Particulars within 15 days from the date of the entry of this Order; and the plaintiff is hereby allowed 20 days after the service and filing of said Bill of Particulars in which to apply for an order allowing plaintiff to file interrogatories to be answered by officers of the defendant corporations.

Dated March 2, 1936.

JAMES ALGER FEE,

U. S. District Judge.

[Endorsed]: Filed March 2, 1936. [34]



And Afterwards, to wit, on the 24th day of March, 1936, there was duly filed in said Court, Defendants' bill of particulars, in words and figures as follows, to wit: [35]

[Title of District Court and Cause.]

#### DEFENDANTS' BILL OF PARTICULARS

Pursuant to the order of this Court dated March 2, 1936, Defendants file the following Bill of Particulars in response to Plaintiff's Motion for Bill of Particulars herein, dated December 20, 1935, the Particulars hereinafter set forth being in response to the correspondingly numbered paragraphs of Plaintiff's Motion:

2 (b) Each of the patents listed in Paragraph XIII of the original and amended Answer to the Bill of Complaint will be offered in evidence as an anticipation of the patent in suit and all thereof will be offered in evidence to show the state of the prior art.

6 (a) H. B. Ross in or about 1919.

6 (b) H. B. Ross in Benton Harbor, Michigan.

[36]

6 (c) The entire combination of Claim 4. Defendant will not rely at the trial upon prior invention by G.A. Grab or Henry Hartwig.

7 Paragraph XVII of the Answer to the Bill of Complaint is hereby cancelled and no evidence in support thereof will be offered at the trial. No further particulars as to such paragraph therefore are required.

8 (a) By Ross Carrier Co. in Benton Harbor, Michigan and Portland, Oregon, and elsewhere in the United States, ever since 1919. By Willamette-Hyster Company and its predecessors in interest in Portland, Oregon, and elsewhere in the United States ever since 1924.

8 (b) By Ross Carrier Co. in Benton Harbor, Michigan and Portland, Oregon, and elsewhere in the United States, ever since 1919. By Willamette-Hyster Company and its predecessors in interest in Portland, Oregon, and elsewhere in the United States ever since 1924.

9 (a) Yes.

9 (b) (First paragraph.) The failure of Plaintiff and its predecessors with full knowledge of the facts to assert any rights under the patent in suit against Defendants' carrier or others substantially identical therewith for more than six (6) years prior to suit.

9 (b) (Second paragraph.) Defendant, Willamette-Hyster Co. and its predecessors in interest in Portland, Oregon, ever since 1924, has expended large sums of money for plant equipment, materials, labor and development work in the manufacture and sale of the carriers alleged to infringe the patent in suit.

The defendant, Clark & Wilson Lumber Company in Portland, Oregon, ever since 1923, has expended large sums of [37] money for the purchase of carriers substantially identical with the carriers com-

plained of herein as infringements of the patent in suit.

Dated March 24, 1936.

WILLAMETTE-HYSTER  
COMPANY,

a Corporation,

CLARK & WILSON

LUMBER COMPANY,

a Corporation,

By CHAS. M. FRYER,

Its Attorney.

CHAS. M. FRYER,

A. C. AURICH,

AUSTIN F. FLEGEL, JR.,

Solicitors & Counsel for Defendant.

[Endorsed]: Filed March 24, 1936. [38]

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And afterwards, to wit, on Monday, the 13th day of April, 1936, the same being the 33rd Judicial day of the Regular March, 1936, term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [39]

[Title of District Court and Cause.]

ORDER ALLOWING PLAINTIFF TO FILE  
INTERROGATORIES.

The motion of plaintiff for leave to file interrogatories to be answered by officers of the defendant

corporations coming up for hearing, it is in accordance with the consent of the parties

Ordered that the plaintiff's proposed interrogatories may be filed, and that the defendants have the usual time from date, as provided by Equity Rule 58, in which to serve and file objections to said interrogatories, or certain thereof; and in the event that objections are filed, the answers to the interrogatories objected to shall be deferred until such objections have been heard and determined by the Court.

Dated April 13, 1936.

JAMES ALGER FEE

U. S. District Judge.

Agreed to.

T. J. GEISLER

Attorney for Plaintiff.

AUSTIN F. FLEGEL, JR.,

of Attorneys for Defendants.

[Endorsed]: Filed April 13, 1936. [40]

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And Afterwards, to wit, on the 13th day of April, 1936, there was duly Filed in said Court, Plaintiff's Proposed interrogatories, in words and figures as follows, to wit: [41]



[Title of District Court and Cause.]

[Endorsed]: Complaint's Exhibit 3. R. F. Maguire, Master in Chancery.

PROPOSED INTERROGATORIES OF PLAINTIFF TO BE PROPOUNDED TO BOTH DEFENDANT CORPORATIONS, AND TO BE ANSWERED BY AN OFFICER THEREOF IN COMPLIANCE WITH RULE 58 OF THE EQUITY RULES.

Interrogatory No. 1.

Referring to the allegation in paragraph XVI of the defendants' answer, and to defendants' Bill of Particulars furnished in response to paragraph 6 (a), (b) and (c) of plaintiff's Motion therefor, to wit, that H. B. Ross in about 1919 in Benton Harbor, Michigan, invented a lumber carrier embodying the combination set forth by claim 4 of the patent in suit:

(a) The defendants are required to furnish plaintiff with a cut, or drawing, together with a full description thereof, showing the construction of the lumber carrier referred to by defendants, and particularly of that part thereof embodying the invention described by claim 4 of plaintiff's patent; or that defendants state the particular place where one of these alleged carriers, as built in 1919, is now located and accessible to plaintiff for inspection thereof; also the name of the party in whose custody said carrier now is. [42]

(b) State whether the said lumber carrier alleged by defendants to have been invented by said H. B. Ross in Benton Harbor, Michigan, in 1919, embodied specifically all of the following elements:

A lumber carrier comprising a frame,  
load lifting means mounted therein,

means for transmitting motion from a source of power to the load lifting means comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction,

means for manually moving the clutch to operative position,

automatic means for moving the clutch to neutral position upon a movement of the load lifting means to a predetermined extent in either direction,

and means for braking the transmitting means whenever the clutch is moved to neutral position.

(c) If said lumber carrier did not embody all of said elements, state which of said elements it did not embody.

#### Interrogatory No. 2.

Referring to the allegation in defendants' Answer, paragraph XX, and defendants' Bill of Particulars furnished in response to paragraph 8 (a) and (b) of plaintiff's Motion therefor, to wit, that lumber carriers embodying claim 4 of the patent in suit were made, and sold, and used by Ross Carrier Co. in Portland, Oregon, ever since 1919:

(a) State the name and location of the party or parties to whom one of these lumber carriers was

sold by said Ross Carrier Co. in Portland, Oregon, in 1919.

(b) State the manner and particulars of the use, in 1919, in Portland, Oregon, of one of these lumber carriers, that is, whether such use was merely a demonstrating use, or was an actual use of the lumber carrier by some other party who was at the time in Portland, Oregon; and in the latter case the name and present address of the party who actually used such lumber carrier. [43]

### Interrogatory No. 3.

Referring further to the allegations in paragraph XX of defendants' answer and defendants' Bill of Particulars furnished in response to paragraph 8 (a) of plaintiff's Motion therefor, to wit, that ever since 1924 in Portland, Oregon, as well as elsewhere, defendant Willamette-Hyster Company made and sold lumber carriers embodying the combination described by claim 4 of the patent in suit:—

(a) State whether defendant Willamette-Hyster Company published and/or distributed to purchasers, or prospective purchasers of lumber carriers, any circular, or pamphlet descriptive of the lumber carriers which the defendant Willamette-Hyster Company manufactured and/or sold since 1924, and showing the embodiment of the combination described by claim 4 of the patent in suit; also the respective dates of such publication.

(b) If defendant answer the preceding interrogatory that it did publish such circular or pam-



phlet, then defendant is required to furnish plaintiff with a copy of such circulars or pamphlets, designated, respectively, by the dates of publication thereof; and if either of such circulars, or pamphlets, is at present no longer in print, defendant Willamette-Hyster Company is required to furnish plaintiff with a photograph copy of the particular pages and cuts of such circular or pamphlet no longer in print, but which describes the lumber carrier on which defendant Willamette-Hyster Company will rely as showing the combination described by claim 4 of the patent in suit.

(c) Defendant Willamette-Hyster Company is further required to furnish plaintiff with a copy of any circular, or pamphlet which it at present distributes to purchasers or prospective purchasers of the lumber carriers and embodying a feature similar to that described by claim 4 of the patent in suit. [44]

#### Interrogatory No. 4.

State whether the lumber carrier which defendant Willamette-Hyster Company is at present manufacturing and/or selling embodies the following elements in combination, viz.:

A lumber carrier comprising a frame,  
load lifting means mounted therein,

means for transmitting motion from a source of power to the load lifting means comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction,



means for manually moving the clutch to operative position,

automatic means for moving the clutch to neutral position upon a movement of the load lifting means to a predetermined extent in either direction,

and means for braking the transmitting means whenever the clutch is moved to neutral position.

Interrogatory No. 5

(a) State whether the defendant Willamette-Hyster Company or anyone in its behalf, had any correspondence, or conversation, with the plaintiff, or any person connected with the plaintiff, since 1924, about a lumber carrier embodying the combination described by claim 4 of the patent in suit.

(b) If defendant Willamette-Hyster Company answer that it had such correspondence, the defendant Willamette-Hyster Company is required to furnish plaintiff with a copy of such correspondence.

(c) If defendant Willamette-Hyster Company answer that it had no such correspondence, but did have such conversation, that defendant state when, with whom, and where such conversation was had.

(d) State whether in said conversation the defendant Willamette-Hyster Company informed the plaintiff that the Willamette-Hyster Company intended to manufacture and sell lumber carriers embodying the combination described by claim 4 of the patent in suit. [45]

## Interrogatory No. 6.

State the date approximately when defendant Willamette-Hyster Company first learned of, or had any information of the plaintiff's patent in suit, and how and from whom it received such information.

The defendant Clark & Wilson Lumber Company is required to answer specifically the following interrogatory.

## Interrogatory No. 7.

State approximately the date when the defendant Clark & Wilson Lumber Company first learned of, or had any information of the patent in suit, and how, and from whom it received such information.

Dated April 2, 1936.

THEODORE J. GEISLER

Attorney for Plaintiff

[Endorsed]: Filed April 13, 1936. [46]

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And afterwards, to wit, on the 6th day of July, 1936, there was duly filed in said Court, a

STIPULATION WITHDRAWING DEFENDANTS' OBJECTIONS TO INTERROGATORIES,

in words and figures as follows, to wit: [47]

[Title of District Court and Cause.]

It is hereby stipulated between the parties that the defendants' objections to plaintiff's Interroga-

tories shall be and hereby are withdrawn, and that defendants shall answer each of said interrogatories separately and fully not later than July 16, 1936.

Dated July 6, 1936.

(Signed) REYNOLDS, FLEGEL & SMITH  
Of Attorneys for Defendants

(Signed) T. J. GEISLER  
Attorney for Plaintiff

So ordered.

---

U. S. District Judge

[Endorsed]: Filed July 6, 1936. [48]

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And afterwards, to wit, on Monday, the 6th day of July, 1936, the same being the 1st Judicial day of the Regular July, 1936 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [49]

### ORDER

Now at this day on motion of Mr. John W. Reynolds, of counsel for the defendants in the above entitled cause, and upon the stipulation of the parties filed herein,

It is ordered that the defendants be and they are hereby permitted to withdraw their objections to plaintiff's interrogatories and that said defendants shall answer each of said interrogatories separately and fully not later than July 16, 1936.

Dated July 6, 1936.

JAMES ALGER FEE

Judge

[Endorsed]: Filed July 6, 1936. [50]

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And afterwards, to wit, on the 15th day of July, 1936, there was duly filed in said Court, Defendants' Answers to Plaintiff's Interrogatories, in words and figures as follows, to wit: [51]

[Title of District Court and Cause.]

[Endorsed]: Complainant's Exhibit 3a. R. F. Maguire, Master in Chancery.

DEFENDANTS' ANSWERS TO PLAINTIFF'S  
INTERROGATORIES

In answer to plaintiff's Interrogatories 1 to 6, inclusive, on file herein, defendant Willamette-Hyster Company alleges as follows:

Answer to Interrogatory No. 1

(a) According to defendant's present information and belief the lumber carrier inquired about was invented in 1921 rather than 1919 as stated in Interrogatory No. 1. Defendant is informed and believes that one of such lumber carriers is in the possession of and can be seen at Goodyear Yellowpine Company, at Picayune, Mississippi, and that another thereof is in the possession of and can be seen at Inman-Poulson Company of Portland, Oregon.



(b) Yes, according to defendant's information and belief.

(c) No answer required.

**Answer to Interrogatory No. 2**

The allegation in plaintiff's Interrogatory No. 2 to the effect that Paragraph XX of defendants' answer and Paragraphs [52] 8-a and 8-b of defendants' bill of particulars allege that lumber carriers embodying claim 4 of the patent in suit were made and sold and used by Ross Carrier Company in Portland, Oregon, ever since 1919 is incorrect as none of the allegations in such paragraphs of defendants' pleadings alleges that Ross Carrier Company made or sold a lumber carrier embodying the combination of claim 4 of the patent in suit. If Interrogatory No. 2 is directed to the actual allegations in Paragraph XX of defendants' answer and Paragraphs 8-a and 8-b of defendants' bill of particulars, then the answer to Interrogatory No. 2 is as follows:

(a) Defendant is informed and believes that a carrier substantially identical in construction and operation with defendants' carrier was sold by Ross Carrier Company to Inman-Poulson Lumber Company at Portland, Oregon, in 1922.

(b) The Ross carrier sold to Inman-Poulson Company as referred to in Paragraph (a) above, according to defendant's information and belief has been in use by that company in its commercial operations in Portland, Oregon since 1922 until the present time.

## Answer to Interrogatory No. 3

The allegation in plaintiff's Interrogatory No. 3 to the effect that Paragraph XX of defendants' answer and Paragraph 8-a of defendants' bill of particulars allege that ever since 1924 in Portland, Oregon, and elsewhere, defendant Willamette-Hyster Company made and sold lumber carriers "embodying the combination described by claim 4" of the patent in suit, is incorrect, as neither Paragraph XX of defendants' answer nor Paragraph 8-a of defendants' bill of particulars alleges that defendant Willamette-Hyster Company made or sold a lumber carrier [53] embodying the combination of claim 4 of the patent in suit. If Interrogatory No. 3 relates to the actual allegations in Paragraph XX of defendants' answer and the actual allegations in Paragraph 8-a of defendants' bill of particulars, the answer to Interrogatory No. 3 is as follows:'

(a) No.

(b) No answer required.

(c) Defendant Willamette-Hyster Company does not at present distribute to its purchasers or prospective purchasers any circular or pamphlet of lumber carriers embodying the features described in claim 4 of the patent in suit. However, a circular or pamphlet substantially the same as defendant Willamette-Hyster at present distributes to its purchasers or prospective purchasers is the one set forth and described in Paragraph 1 of plaintiff's bill of particulars on file herein, dated November 26, 1935, such circular being referred to therein as

“Service Manual Complete with Spare Parts List, Instructions for Maintenance and Operation.”

Answer to Interrogatory No. 4

The industrial truck or carrier that defendant Willamette-Hyster Company is at present manufacturing and selling comprises a frame, screw lifts supported by such frame for raising and lowering any desired load, a motor to supply power for operating the screw lifts, a power controlling device to transmit and control power from the motor to such screw lifts, a handle for manually operating such power controlling device to drive the screw lifts in either of two directions or to bring the power controlling device to neutral position so that no power from the motor is transmitted to the screw lifts, an automatic spring operated brake to hold the screw lifts and [54] connected mechanism against movement whenever the power controlling device is placed in neutral and limit stops cooperating with screw lifts and operable automatically and independently of any load carried by the truck to bring the power controlling device to neutral whenever the screw lifts reach predetermined upper and lower limits.

Answer to Interrogatory No. 5

- (a) No.
- (b) No answer required.
- (c) No answer required.
- (d) No answer required.



## Answer to Interrogatory No. 6

Defendant Willamette-Hyster Company first learned of the patent in suit through Mr. G. A. Grab, who has been in charge of its industrial truck or carrier business ever since its inception, and Mr. G. A. Grab has known of the patent in suit ever since the date of its issuance.

WILLAMETTE-HYSTER COMPANY  
By G. A. GRAB

State of Oregon,  
County of Multnomah—ss.

G. A. Grab, being first duly sworn, deposes and says: I am the G. A. Grab mentioned in and who signed the foregoing Answers to Interrogatories. I have read such Answers and the Interrogatories to which they are a reply and know the contents thereof. The facts alleged in such Answers are true of my own knowledge except as to the matters therein alleged on information or belief, and as to those matters I believe them to be true.

G. A. GRAB [55]

Subscribed and sworn to before me this 15th day of July, 1936.

[Seal] A. F. FLEGEL, JR.

Notary Public for the County of Multnomah,  
State of Oregon.

My Commission expires June 17, 1939.

In answer to plaintiff's Interrogatory No. 7 on file herein, defendant Clark and Wilson Lumber Company alleges as follows:



Answer to Interrogatory No. 7

In or about October, 1935.

CLARK AND WILSON LUMBER  
COMPANY

By C. G. KINNEY

State of Oregon,  
County of Multnomah—ss.

C. G. Kinney, being first duly sworn, deposes and says: I am the Vice Pres. and Genl. Mgr. of Clark and Wilson Lumber Company and as such signed the foregoing answer to plaintiff's Interrogatory No. 7. I have read such answer and the interrogatory to which it is a reply and know the contents of such answer and the same are true of my own knowledge.

C. G. KINNEY

Subscribed and sworn to before me this 15 day  
of July, 1936.

[Seal]                      H. M. KRELS

Notary Public for the County of Multnomah,  
State of Oregon.

My Commission expires Oct. 24, 1938.

[Endorsed]: Filed July 15, 1936. [56]

And Afterwards, to wit, on Thursday, the 12th day of November, 1936, the same being the 9th judicial day of the Regular November, 1936 term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [57]

### ORDER OF REFERENCE

This cause having been regularly set on the calendar of this court for final hearing on the 16th day of November, 1936, and on the 12th day of November, 1936, plaintiff appearing by Mr. T. J. Geisler, of counsel, and the defendants having appeared by Mr. Austin F. Flegel, of counsel, and it appearing that the trial calendar of this court is congested by reason of a vacancy in the office of United States District Judge for this District and that there are a number of causes awaiting trial by jury, including a number of criminal causes which are entitled to preference over civil matters as to the trial thereof, and it appearing that this condition will continue unless many of the causes now pending, including this cause, can be disposed of in the manner herein provided, and hence that in order to fairly and within a reasonable time dispose of the business before the court, it is necessary that this order be made, and the court deeming it expedient and necessary for the purpose of justice that this cause be referred to the Standing Master in Chan-

cery to hear the parties to this cause and make a report herein,

It Is Ordered that this cause be and it is hereby referred to Mr. Robert F. Maguie, Esquire, Standing Master in Chancery, who will in an advisory capacity and in accordance with the equity rules and **the rules of this court**, take testimony herein and have the same transcribed, receive evidence, make findings of fact and draw conclusions of law, on all issues disclosed by the pleadings referred herewith, and recommend to the court a decree to be entered thereon, all to be delivered to, received in, and finally passed upon by this court.

Said Master is authorized and empowered to do all things, and to make such orders as may be required to accomplish a full hearing on all issues of fact and of law in this cause, and the exceptions of the parties to the rulings, findings, conclusions and recommendations, of said Master are reserved, and the costs of this proceeding shall abide the event.

Dated at Portland, Oregon, this 12th day of November, 1936.

JAMES ALGER FEE,

Judge.

[Endorsed]: Filed November 12, 1936. [58]

And Afterwards, to wit, on the 1st day of July, 1937, there was duly filed in said Court, a Master's Report, in words and figures as follows, to wit: [59]

[Title of District Court and Cause.]

#### MASTER'S REPORT.

To the Honorable James Alger Fee, Judge of the  
Above Entitled Court:

On the 12th day of November, 1936, the above entitled suit was referred to the undersigned as Master in Chancery to take testimony, make findings of fact and conclusions of law and recommendation to Your Honor upon the issues of fact and law involved, and the relief, if any, to be granted in the above entitled suit.

Pursuant thereto, the parties appeared before the Master, the plaintiff appearing by T. J. Geisler, Esq., its solicitor, and the defendant appearing by Mr. Austin F. Flegel, Mr. Charles M. Fryer and Mr. Alfred C. Aurich, of [60] its solicitors. The parties submitted testimony in support of the issues and thereafter submitted the matter to the Master upon oral argument and written briefs.

The Master begs to submit his report on the proceedings as follows:

#### Statement of the Case.

The plaintiff is assignee of United States Letters Patent No. 1457025, issued May 29, 1923, to Carl F. Gerlinger, and was such assignee at all times involved in this suit.



Plaintiff alleges that the defendant Willamette-Hyster Company, with knowledge of the letters patent, has wilfully and deliberately manufactured lumber carriers embodying the patented improvements, has sold the same to lumber mills and others, including the defendant Clark & Wilson Lumber Company, and that the latter has used and continues to use lumber carriers embodying the patented improvements without license from plaintiff and in violation of its rights. It is alleged that the defendants and each of them, by said infringement, have respectively made and continue to make substantial profits which belong to plaintiff, for which it seeks an accounting. It prays for a decree (1) adjudging the letters patent to be valid [61] and the entire rights therein vested in the plaintiff; (2) that each of the defendants be adjudged to infringe the patent in suit and that they be temporarily and, upon final decree perpetually, enjoined from infringement; and (3) that an accounting be had of the profits made by the defendants and the damages and losses sustained by plaintiff by reason of the infringement in question.

The defendants, answering jointly, deny the validity of the patent, deny that Gerlinger was the first and original inventor of the device described in the patent, and deny infringement. They then set up the following further and separate defenses:

1. Lack of infringement, in view of the state of the prior art;

2. That the patentee was not the first, sole, or any inventor or discoverer of the alleged invention, or any material or substantial part thereof, but that for more than two years prior to the filing of the application for patent the alleged invention had been shown, described and patented in the following letters patent of the United States and foreign countries, and publicly used and on sale and sold by each of the patentees, and that said patentees were in fact the first and original inventors thereof and were using reasonable diligence in adapting and perfecting [62] the same.

Name.	Number.	Date.
Van Emon .....	43451	July 5, 1864
Herdman .....	507617	Oct. 31, 1893
Bouch .....	722444	Mar. 10, 1903
Carr .....	1407124	Feb. 21, 1922

And by amendment cite,—

Towson .....	1337804	Apr. 20, 1920
Cochrane .....	1399543	Dec. 6, 1921
Wright .....	1404419	Jan. 24, 1922
Hertner .....	1505889	Aug. 19, 1924

3. That for more than two years prior to the filing of the application for the patent in suit there was in public use and on public sale a carrier embodying the alleged invention known as the Ross Carrier, and that other devices likewise embodying the alleged invention were used and sold by other named persons;

4. That more than two years prior to the filing of the application the alleged invention had been disclosed in various printed publications;

5. That the patent is invalid because Gerlinger was not the original, first, or any inventor thereof, but the actual inventors were G. A. Grab, H. B. Ross and Henry Hartwig;

6. That the patent is invalid because Gerlinger, for the purpose of deceiving the public, did not include in his application the whole truth of the alleged invention. (This, however, defendants subsequently abandoned). [63]

7. That by reason of the action of the Patent Office in rejecting each and all of the broad claims of the application, which rejection was acquiesced in by the applicant, the letters patent were issued without embracing any but narrow claims limited to the precise details disclosed in the specifications, and therefore plaintiff is estopped from contending that the claims of the patent are as broad, or broader, than the rejected and cancelled claims, or sufficiently broad to cover the alleged infringing machine;

8. That the invention sought to be patented is without utility and was never put into actual practical or any use; that it cannot be patented by any one, and that it is inoperative and worthless;

9. That plaintiff is guilty of laches and is estopped to assert any rights against the defendants,—for that lumber carriers substantially identical in construction and operation with the lumber



carriers complained of have been made, sold and widely used for more than six years prior to the beginning of this suit (of all of which plaintiff had full knowledge); but neither it nor its predecessor, prior to the institution of this suit, asserted or attempted to enforce any alleged rights to the patent with respect to such long, continuous manufacture, use and [64] sale, and have continually recognized and acquiesced in defendants' rights and those of the public to manufacture, sell and use such lumber carriers, and that defendants have invested large sums of money in making, using and selling such lumber carriers, relying upon plaintiff's acquiescence.

### The Patent

By its bill of particulars, plaintiff relies upon the alleged infringement of Claim 4 of the patent.

Claim 4 is as follows:

A lumber carrier, comprising

1. A frame;
2. Load-lifting means mounted THEREIN;
3. Means for transmitting motion from a source of power to the load-lifting means, comprising a clutch that can be set in neutral position or to cause the load-lifting means to move in either direction;
4. Means for manually moving the clutch to operative position;
5. Automatic means for moving the clutch to neutral position upon the movement of the load-lifting means to a predetermined extent in EITHER direction;



6. Means for braking the transmitting means whenever the clutch is moved to a neutral position.

It may serve, in properly analyzing this patent, to state what was the previous state of the art and [65] what the patentee claims to have invented. The machine shown in the patent is a self-propelled carrier, containing a lifting device, which picks up a load WITHIN and not UPON or in FRONT of its frame, and enabling the load to be picked up, transported and deposited as desired. None of these things were new in the art when the patentee applied for his patent.

These carriers, used originally and principally for the purpose of picking up and transporting piles of lumber, in the earlier stages of development utilized a cable or chain lift. Defects were discovered, in that the cable did not give a positive and uniform lift. The next method of lifting means adopted was rackbars and pinions driven from the power plant of the machine. Gerlinger claims to have been the originator of this kind of a hoist as adapted to a straddle type lumber carrier. In use it was found that, while the lift was positive and uniform, considerable care was required on the part of the operator manually to disconnect the power from the lifting mechanism when the load had reached the proper height, and that in the course of travel vibration of the machine and other factors tended to cause the mechanism to settle to such an extent that sufficient clearance did not exist between the bottom of the load and the ground. [66]

The problem to which the patentee claims to have addressed himself was the development of means whereby, when the load was lifted, the hoisting mechanism would be stopped automatically at the desired point, the power disconnected therefrom, and the brake applied so as to prevent the settling of the load, and, further, that when the hoisting machine was reversed for the purpose of picking up a load the action would be automatically stopped at a desired point, the power again disconnected and the brake applied; all this without action on the part of the operator.

This Gerlinger accomplished. The means disclosed by his patent and his drawings are as follows:

1. To limit upward movement and procure automatic means for moving the clutch to neutral (thus disconnecting the source of power from the hoisting mechanism) and simultaneously applying the brake, he proposed a bar (No. 67, figure 3 of the patent drawing) moving on a pivot which would be engaged by the top of the load as it was hoisted, with suitable linkage which pushed the clutch into neutral and applied the brake. This linkage and this brake are Nos. 48, 69, 74, and 76 of the patent drawing. [67]

2. On downward movement of the hoist, to procure like automatic disconnection of the clutch and application of the brake, he proposed an adjustable set screw (No. 65) attached to the upper end of the right hand rear rackbar, which, as the load was lowered, engaged one arm of a bell crank lever, (No.

66), the other end of which lever engaged the rear end of clutch lever No. 64 and in the movement threw the clutch into neutral and simultaneously actuated linkage, 74, which in turn, by means of a cam at its outer end, raised a brake, 76, engaging the shaft, 46, which drives the gears of the lifting mechanism.

The question is,—does this constitute invention and, second, does defendant's device infringe upon it?

The prior art clearly discloses the use of like means and hoists and elevators, some of them stationary, some of them mounted on wheels and, of the latter, some with and some without motive power for self-propulsion. It is to be observed that the early art does not disclose self-propelled hoists or carriers in which the load is carried **WITHIN** the frame and **BETWEEN** the wheels, but clearly discloses stops of various kinds, which at a given stage of hoist movement, up or down, [68] throw the clutch into neutral, thus disconnecting the lifting power and applying a brake. The means adapted differ no more from those of Gerlinger than do the means applied by him differ from the means employed by the defendant.

The stops in defendant's infringing device are not placed on the rackbar, and in fact the device does not use a rackbar. Nor is the stop which limits the upward movement of the hoist **ACTUATED BY THE LOAD**. Defendant's means for disconnecting the clutch and applying the brake is shown



in Exhibits 34, 52 and 56b. As is seen in Exhibit 52, power is transmitted by means of a clutch to a chain and sprocket, (shown in yellow), which is fixed at the end of a threaded shaft, which in turn carries a traveling nut (colored in purple). Attached to this nut are suitable levers, which, as the nut is moved along the revolving threaded shaft, change their position, thus lifting or lowering the hoist, depending upon the direction in which the nut moves along the yellow shaft.

Referring now to Exhibit 52, which delineates in detail the clutch shifting and braking [69] mechanism, it will be seen that as the nut moves along the shaft it engages stops fixed on a moveable shaft (all colored in red). This action throws the clutch into neutral, disconnecting the power from the hoisting mechanism, and applies the brake (shown in orange).

It is to be remembered that Gerlinger's stop governing upward movement is actuated **ONLY** by the load and the downward stop is actuated by a setscrew on the right rear rackbar.

The plaintiff and the patentee built but one machine containing a load-actuated upward movement stop bar (No. 67). It had defects which in actual operation became obvious. If the load was not of sufficient height to engage bar 67 by the time the rackbars had reached the end of their normal travel, or if the load was not properly distributed on the lift, bar 67 would not operate and the hoist mechanism would be subject to damage, due to upward



movement beyond the designed range, thus either stripping the pinion or the rack teeth.

This the patentee and his assignee corrected by eliminating bar 67 and placing the upward [70] movement stop on the rackbar. Exhibit 6 shows the new means which Gerlinger adopted to govern upward movement. No. 91 on the rackbar engaged element No. 90, which in turn engaged bell crank No. 66. The action of Nos. 90, 91 and 66 performed the same function with regard to upward movement of the hoist that Nos. 65 and 66 performed in the downward movement. Nos. 90 and 91 will not be found in the drawings or specifications of the patent, inasmuch as they were adopted after the application had been filed. But stops which automatically disconnect power from hoisting mechanism, by throwing the clutch into neutral and applying brakes, are not new.

The Dingee patent 414380 (Exhibit 59) issued November 5, 1889, clearly disclosed such a device. It relates to a stationary elevator or hoist. It discloses a clutch manually operated, by which power is transmitted to the hoisting mechanism and when power is thus applied, upward or downward movement is communicated to the load lifting means; when the load reaches a predetermined position, a projection on the lift engages a stop on a cable by which the clutch is manually operated, throws it into neutral and simultaneously applies the brake. (See Exhibit 60). [71]

The Nicholson patent 134045 (Exhibit 62) issued May 18, 1920, covers a movable freight stacking elevator, which may be self-propelled. It is a front-end hoist, thus differing from the type of carrier shown by Gerlinger's drawings and specifications. However, it is a carrier with a frame, has load lifting means mounted therein, means of transmitting motion from a source of power to the lifting means, and a clutch that can be operated manually, set in neutral or so as to cause the load lifting means to move in either direction; it has automatic means for moving the clutch to neutral upon movement of the load lifting means to a pre-determined extent in either direction and means for simultaneously applying a brake whenever the clutch is in neutral. The only material difference in structure between that shown in plaintiff's patent and the Nicholson machine is that the frame containing the load lifting means is at the front end of the carrier and the load is carried at the front end instead of between the wheels.

The French and Pavey patent No. 1360917, (Exhibit 64), issued November 30, 1920, covers a device consisting of a hoist mounted on a truck. [72]

Lumber or any other portable commodity, within the capacity limits of the truck, can be picked up, hoisted, transported to another place and deposited. It is a FRONT-END truck and in that respect differs from the structure disclosed by plaintiff's patent to the same extent as does Nicholson's. The

stop which actuates the clutch and throws it into neutral and causes a brake to be applied consists of a nut on a threaded main shaft which engages lugs or collars which, by appropriate connection, throws the clutch into neutral and applies the brake. The operation is similar to that adopted by the defendant. (See Exhibit 65).

The patent to Towson, et al, 1,337,804, (Ex. 66), issued April 20, 1920, is a self-propelled industrial truck, carrying a load in the front end, having a hoist with limited movement, disclosing automatic means for disconnecting power from the hoisting mechanism and simultaneously applying a brake. It does not disclose a clutch inasmuch as it is an electrically operated machine. The [73] automatic stop merely breaks an electrical contact and thereby disconnects power. (Exhibit 67).

The Carr patent (Exhibit 69), No. 1407124, issued February 21, 1922, is a self-propelled electrically operated elevator truck with a front-end lift. It contains no clutch but by making and breaking the electrical contact, connects or disconnects the source of power. It has an automatic brake and by virtue of certain stops, the power is disconnected and the brake automatically applied both at predetermined upper and lower limits of travel.

It will thus be seen that in hoists and in elevators, whether stationary or movable, and irrespective of the source or kind of power, long prior to the time of Gerlinger, men had recognized the problem of providing means for automatically limiting upward



and downward travel of load lifting means by disconnecting the source of power from the lifting means and of simultaneously applying a brake to prevent further movement of those means. Divers kinds of means have been efficiently employed. In each of the cases above referred to, the stopping of upward or downward movement was not [74] dependent upon the presence of a load upon the load lifting means. The particular means described by Gerlinger in his drawings and specifications, so far as limitation of upward movement is concerned, is bar No. 67, which is only operative when a load is present and is, at times, inoperative when the load was not sufficiently high, or so placed, or of such a character as not to engage and move that bar. The automatic stop of upward movement adapted by the defendant is not dependent upon the presence of a load and is positive in character.

Before considering whether or not defendants infringed upon Gerlinger, it becomes necessary to determine what, if anything, he invented. Has he exercised inventive genius or has he merely aggregated well known devices, gaining neither new nor better results than were known to or utilized by the previous art.

Of what does his device consist. He speaks of it as a lumber carrier. He insists that a lumber carrier is to be distinguished from other carriers because it connotes a carrier of a particular kind, namely, a straddle type carrier. [75]



The Master is of the opinion that the patentee gained nothing by the use of the term "lumber carrier". Carriers of the type in question are adopted for and actually used for elevating, transporting and depositing objects other than lumber. They can and have been used for carrying pipe, cement, bricks and other things. The art involved is that of self-propelled carriers, having load lifting and lowering means. An inventor cannot avoid anticipation or acquire patent rights by declaring that his device is limited to the use of a particular commodity nor can an infringer avoid infringement by asserting that he uses his device for carrying a different commodity than that mentioned by the patentee in his specifications or drawings.

### Art

The art which is to be considered, broadly speaking, is that of hoists and elevators, or more narrowly, that of hoists and elevators mounted on wheels; while most narrowly limited it is that of hoists and elevators on wheels with means of self-[76] propulsion. That all of these things were old does not of itself exclude invention but it definitely limits patentability to improvements in these fields. He who attempts to obtain a patent in a well occupied art must necessarily be limited to a patent of the specific means shown and a narrow range of mechanical equivalents.

Where the improvement consists in NEW means for obtaining a result heretofore accomplished by

other means, generally speaking, the applicant can obtain a patent only on the NEW means which he has disclosed and is not entitled to protection as to ALL means adopted for the accomplishment of that result.

We may take for example the sweat-band in a hat. The previous art might disclose means of fastening sweat-bands to hats by sewing or glueing the band to the hat. An ingenious mind, conceiving the advantages to be obtained by clamping the band to the hat, devises means for so doing. This might well be invention, entitling the inventor to a patent, but it would not entitle him to a patent on ALL means of attaching sweat-bands to hats, inasmuch as the art discloses various means [77] for so doing. His patent, therefore, would be limited to the NEW means he discloses with a range of equivalents of a similar nature; but not to means such as sewing, glueing or even securely incorporating the band with the fabric.

In the broad field of hoists and elevators, automatic means for disconnecting the source of power from the automatic mechanism and automatically applying the brake to that mechanism were old. In the narrower field of wheeled hoists and even as to self-propelled wheeled hoists it was old. The problem had been conceived and means provided. Gerlinger can only claim that he perceived the problem and he provided a NEW or DIFFERENT means of providing it. As has been stated his means

differed from his predecessors only in the LOAD-ACTUATED factor, to this he may well be entitled to patent protection; but if so, the defendant's mechanism does not infringe, because it does not utilize such a factor but operates irrespective of the presence of the load.

Having observed that the chain or cable loading mechanisms in straddle type lumber carriers [78] had certain inherent defects which could be remedied by a mechanism of a positive or rigid type such as rackbars and pinions, toggle lifts or screw type, it would seem that a mechanic of ordinary skill would at once appreciate the necessity of providing means to prevent damage to such mechanism should the operator fail to stop the raising or hoisting of the elevator when the proper limits of travel had been reached. Such means in the art of hoists and elevators had already been conceived and published. In fact both problem and means of solution had been disclosed.

What has been said with regard to the state of prior art or lack of invention does not imply that Gerlinger was in fact familiar with the state of the art or that he knowingly appropriated something that he knew was old. It may well be that he was in ignorance of the prior art and that his device was the result of original conception on his part. It is not sufficient that he should have invented, but he must have been the first to have invented. Unless he was such, he is not entitled to a patent.



But even though Gerlinger's concept of [79] automatic means of cessation of movement was original, so far as he was concerned, it was not NEW. To be patentable the concept must not only be ORIGINAL, but it must have the additional element of NOVELTY. In speaking of lack of originality and novelty, and therefore of consequent unpatentability, it must be remembered that this applies to the broad claims of ALL MEANS of automatic cessation of movement and braking. A patentee may be entitled to a patent of SPECIFIC means and not be entitled to broad protection or a wide range of mechanical equivalents.

When Gerlinger entered the field, he found self-propelled carriers equipped with hoisting mechanism adapted to pick up a load and later to deposit the load which was itself carried within the frame members instead of on or in front of the frame. If he added anything, it was merely the means for automatically disconnecting power from the hoist and applying a brake. Carriers of this kind actually consist of two machines, one a self-propelled truck, and the other a hoist. Except that they are disposed on or within the same frame, they are entirely independent. The truck could be [80] propelled without a hoist, and the hoist could be operated without regard to the propelling mechanism. They perform separate and wholly distinct functions. Obviously the man who conceived the idea of a self-propelled truck, equipped with a hoist that would pick up a load WITHIN the frame members, dis-



played inventive genius of a high order, which the commercial success of the device demonstrates. It enabled the operator to straddle the load instead of approaching it from the side or from the end. It enabled loads to be spaced on a loading platform with only sufficient distance between, either laterally or longitudinally, to enable the frame to pass between the piles, and it likewise overcame the necessity of counterweighting the rear end of a front-end hoist to equalize the load to be carried.

It is likewise obvious that invention may occur in improving the original conception.

But the question is whether or not he, whose improvement consists of merely adding either to the mechanism of propulsion or the mechanism of elevation, devices which are old in the art of [81] propulsion or old in the art of mechanical elevation, has invented anything. It is apparent that if Gerlinger had added his improvement of automatic disconnection of power from the hoist and an automatic brake to a STATIONARY elevator he would have invented nothing, because all those things were old. It is likewise apparent that had he added to the mechanism of propulsion an element old in that art, he would have invented nothing.

What he said was this:

“Up to the present time STRADDLE trucks, that is, those carrying loads WITHIN the frame, have no means of automatically stopping upward and downward movement of the hoist or load lifting means and applying a brake

thereto. These are desirable. In my carrier of that type I intend to use a hoist which has a stop and I adopt a type of hoist already known which is so equipped."

But, Gerlinger is not the inventor of means for automatically stopping or automatically braking the upward or downward movement of elevators or hoists.

The plaintiff has to a large degree confined the field of inquiry and consideration by stipulating that the defendant's front-end hoist does NOT infringe the patent.

This carrier (shown in Exhibits 41, 42 and 43) is a carrier adapted to hoisting, transporting, [82] lowering and depositing lumber. It comprises (1) a frame, (2) load lifting means mounted THEREIN, means for transmitting motion from a source of power to the load lifting means comprising (3) a clutch that can be operated manually and set in neutral position or so set as to cause the load lifting means to move in either direction, (4) means for manually moving the clutch to operative position, (5) automatic means for moving the clutch to neutral position upon movement of the load lifting means to a pre-determined extent in either direction and means for braking the transmission means whenever the clutch is moved to neutral.

In fact many of the parts comprising the automatic stop and braking means are interchangeable with those on the straddle type carrier manufac-

tured by defendant, which plaintiff contends infringes his patent. Plaintiff attempts to distinguish between defendant's front end truck and defendant's straddle type truck by asserting, first, that in the front end truck the load lifting means are not mounted THEREIN but that they are mounted THEREON or THEREFROM. [83] It is further asserted that the claims of his patent shall be limited or confined to carriers having load lifting means mounted in a frame with FOUR LIFTING points that lift positively and in unison. Plaintiff contends that thus construed, the Gerlinger patent eliminates front-end trucks having LESS than FOUR lifting points. The Master, however, can conceive no difference in the problem which would arise in a carrier having four lifting points and one having a lesser number provided positive means of lifting are used. Nor is it clear that any different problem arises when the load is carried within the frame members from that which exists when the load is carried at the end of the frame members. By positive lifting means the Master understands those which contain no element of friction, such as a drum, and no element of elasticity, such as might be present in a rope or a cable,—means, which, when power is applied, immediately and without variation lift or lower the load. Obviously if such means are to be adopted, automatic stops must be provided; otherwise, the machine will be wrecked. Gerlinger says he was the first to combine a hoist with a "O" shaped, self-propelled [84] carrier and, having done



so, he is entitled to a patent monopoly on any device which consists of a "O" shaped self-propelled carrier equipped with a power operated hoist having automatic stops capable of disconnecting power at predetermined points of upward or downward movements and simultaneously applying a brake. He is forced to this position because of the difference in the means disclosed by his patent, its drawings and specifications, and those employed by the defendant's machine.

But, given a self-propelled carrier having a "O" shaped frame, having mounted therein a hoist, is it invention to add a well known automatic stop to this apparatus, or is it merely a mechanical improvement?

Courts approach the defense of lack of originality or invention with great caution. The applicant for a patent is required to submit his drawings, specifications and claims of invention to the Patent Office, where it is examined, contrasted and compared by public officials, [85] presumably experts in separating mere improvements, obvious to the trained mechanic, from those involving inventive genius, and who are trained and learned in the history and progress of any given art and are presumed to be able to distinguish the new from the old. When the Patent Office has determined that originality and invention exist and issued its patent thereon, courts are bound to and should give great weight to this administrative decision. The object of the patent law is to encourage and not discourage inventors,



and to defeat and not shelter those who seek to reap where another has sown.

As has been many times observed, he who has appropriated the inventive concept of another, when sued for infringement, is prone to aver that the concept is not new, that it was long since anticipated and that it involved no exercise of invention, but was itself a mere appropriation of early concepts, or the exercise of ordinary mechanical skill. Such defenses, therefore, are properly regarded with suspicion and accepted only with caution. [86]

The courts have long recognized the comparative ease with which such contentions can be made. Invention may exist in taking well known elements and so combining them as to obtain new or better results. After the event, it may be wondered that the combination had never before been conceived, because both the problem and the answer seem obvious. But such afterthoughts must not be permitted to defeat actual invention.

Notwithstanding this salutary and well settled rule, and notwithstanding the *prima facie* presumption of validity arising from the issuance of a patent, courts are bound, when the question is raised, to consider the fact of originality and invention and, if it does not exist, so to declare. They have recognized that patent prosecutions partake of the nature of *ex parte* proceedings and that in some instances patents have been inadvertently or ill-advisedly allowed and issued. The plaintiff herein does not limit the scope of his patent to a SPE-

CIFIC means, whereby the clutch is thrown into neutral and the brake simultaneously [87] applied. In fact, if it did so, no infringement would exist, as admittedly the means used in the defendant's device are different in character, although the same in function. Plaintiff insists that his patent covers ANY means which will bring about the desired results. It is unnecessary to consider or decide whether or not, if the Gerlinger patent is limited to the SPECIFIC means, it discloses originality and invention, and is valid.

The patent may thus be analyzed:

1. A lumber carrier with a "O" shaped frame; (which he did not invent)

2. Load lifting means mounted THEREIN; (which he did not invent); or

- 2-a. Load lifting means mounted THEREIN, having FOUR lifting points that lift positively and in unison (which he may well have been the first to conceive)

3. Means for transmitting motion from a source of power to the load lifting means, comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction (which he did not invent); [88]

4. Means for manually moving the clutch (which he did not invent);

5. Automatic means for moving the clutch to neutral position upon the movement of the load lifting means to a predetermined extent in either direction (which were old in the art of hoisting and

elevating loads in both stationary or moveable elevators and hoists);

6. Means for braking the transmitting means whenever the clutch is moved to neutral position (which were old in the art of hoisting and elevating loads in both stationary and moveable elevators and hoists).

It is a serious question whether the addition to the hoisting mechanism of stops and brakes constitutes invention in view of the state of the prior art, but the Master is of the opinion that it is not necessary to pass upon this question.

Plaintiff's automatic stops and brakes have no effect upon the operation of the lumber carrier in any respect, except that operation which concerns the load lifting mechanism. The carrier can [89] be operated forward and backward; it can be steered in any direction with the same facility and results WITH OR WITHOUT automatic stops and brakes. If Gerlinger conceived a new combination, it was a combination in the hoist and it is immaterial whether the hoist be moveable or stationary. Automatic stops disconnecting the source of power from load lifting means and predetermined points of upward and downward movement is not his invention; they are old; means for braking the transmitting means whenever the clutch connecting the source of power to the load lifting means is moved to neutral was not his invention; it was old. Because of this, his patent is not primary and cannot be accorded a broad construction, but must be lim-



ited to the particular means he describes and an exceedingly narrow field of equivalents.

If thus limited, it must be defined as an automatic stop actuated by the load itself in upward movement and an automatic stop controlling the downward movement of the kind and character shown [90] by his drawings and specifications. Under this limitation and construction of the patent the defendant's device does not infringe. Defendant achieves cessation of upward movement irrespective of the presence of the load and the means to control the downward movement is substantially different from that described by Gerlinger's plans and specifications. Even if it can be said that defendant's means of downward movement control is a mechanical equivalent of Gerlinger's means for such control, still infringement does not exist because defendant's device omits an essential element of Gerlinger's combination, namely, the LOAD-actuated stop governing upward movement. The only way in which Gerlinger's can be distinguished from the prior art of automatic stops and brakes and hoisting mechanisms is in the load-actuated device. He did not teach the world that lifting mechanisms, with either flexible or rigid lifting means, required automatic stops and automatic brakes. That it had known for years.

It is only after detailed study and consideration and with considerable reluctance that [91] the Master has reached his conclusion, a reluctance arising from the propriety and necessity of giving great



weight to the proceedings of the patent office. But the field in which Gerlinger labored was crowded. The necessity for automatic stops and automatic braking of load-lifting means was as real in stationary load-lifting devices as it was in moveable or self-propelled load-lifting devices. It was as great in a front-end truck carrier as it was in a straddle-frame carrier; it was as real in a carrier having two lifting points as it was in one having four. It existed in a carrier with a positive or rigid lifting means just as it did in one where those means were less positive or non-rigid. Unfortunately, others had seen the problem and others had given an efficient and satisfactory answer.

The Master, therefore, finds that under the construction given to Gerlinger's patent, defendants' device does not infringe and so reports to Your Honor.

### Laches

In view of the Master's conclusion with regard to infringement, it may seem unnecessary [92] to discuss the question of laches. But, in view of the fact that the court may not approve the Master's finding and recommendation in that respect, he begs leave to report to the court his findings, conclusions and recommendations upon the subject of undue and inequitable delay.

Gerlinger's patent in suit, No. 1457025, issued May 29, 1923, on his application filed March 30, 1922. His bill of complaint herein was exhibited October 3, 1935.

As early as September, 1923, the defendant Clark & Wilson Lumber Company had purchased two Ross carriers, both of which have been in constant use ever since. These Ross carriers are of a straddle type with load-lifting means mounted in the frame, the lift is positive from four points working in unison; it has a clutch manually operated, which can be placed in neutral, and when in operative position moves the lift in either direction; it has means which, when the lift [93] has reached a pre-determined point in upward or downward movement, throw the clutch into neutral and apply a brake to the load-lifting means. The upward movement is not controlled by the movement of the load. The type of means adopted by Ross differs somewhat in construction from that employed by Gerlinger and from that employed by the defendant Willamette-Hyster Company, but efficiently achieves the desired result. If defendant Willamette-Hyster Company infringes Gerlinger, so does Ross. The infringing device in suit was first designed and constructed by the Willamette Iron & Steel Company in September, 1926. The defendant Willamette-Hyster Company succeeded to the carrier business of the former in 1929, and both companies, during their respective periods of operation, continuously manufactured and sold the alleged infringing device. The gross amount of defendant's sales of the alleged infringing carrier are approximately \$2,000,000.00.

At least as early as December, 1925, (Exhibit 22) the Ross carrier company advertised [94] its carrier in trade journals, such as "The Timberman", where it was claimed "The hoist is positive and uniform at all four POINTS of lift. Automatic cut-outs are provided to prevent damage by unskilled operators". To the user and to the Ross Company's competitors this could mean but one thing, namely, that means had been provided for automatically disconnecting the source of power from the load-lifting mechanism.

Ross' advertisement in The Timberman of November, 1926, is even more specific. It is there said:

#### "POWER TAKE OFF

In constant mesh with transition gear. *Connected to hoisting mechanism by single disc dry clutch, which is controlled by single hand lever for starting or stopping hoists in either direction. Equipped with automatic brakes of ample size. Load may be raised or lowered while carrier is in motion. Hoist stops automatically at upper and lower limit of travel.*" (Italics mine)

Such language, to the trade and to Ross' competitors, is susceptible of but one meaning,—namely that the hoist mechanism had a clutch for [95] connecting and disconnecting the load lifting means from the source of power; that it had an automatic brake and that means were provided for disconnecting the source of power from the hoist at pre-determined points of upward and downward movement.



Gerlinger and the other officers of the plaintiff insist that they had no knowledge that either Ross or Willamette Hyster employed automatic means for disconnecting power from the hoist and automatically applying a brake. Except for the testimony of G. A. Grab, the managing director of the carrier department of the defendant Willamette Hyster Company, there is no DIRECT proof that they had such knowledge. Grab was employed by Gerlinger and the plaintiff from 1921 to January 1, 1926. He was in charge of its sales and service. He claims that shortly after Clark & Wilson purchased Ross carriers in 1923 he inspected them, observed automatic stops and brakes and reported same on several occasions to the patentee Mr. Gerlinger. Certainly it is entirely likely that while so employed by plaintiff he became familiar [96] with the construction of the Ross carrier. It is difficult to believe that he would not have been sufficiently interested in a competitor's product not to make such inspection and ascertain such facts. Mr. Gerlinger, however, specifically denies that Mr. Grab ever spoke to him about the stop mechanism of the Ross carrier, although he admits that he may have mentioned the fact that Clark & Wilson had purchased Ross carriers.

When Grab left the employment of plaintiff it is evident that some feeling of hostility existed between Gerlinger and himself. He immediately obtained employment with one of plaintiff's competitors, the Willamette Iron & Steel Company, and he is



now a highly interested witness. For these reasons the Master would hesitate to find that Gerlinger had antecedent knowledge of Ross' stop and brake mechanism based solely upon Mr. Grab's testimony.

However, there are other persuasive facts in the record on this subject. The market for straddle type carriers is comparatively limited. The competitive field is largely occupied by Ross, Willamette Hyster and plaintiff. The competition between them is and [97] has been keen. These carriers are not machines which are hid away or concealed from public and general observation. In each type of machine the automatic stops are in plain view and the automatic brake is likewise visible to casual inspection or, at least, its presence is plainly indicated. When used, these carriers travel through lumber yards and over loading platforms, largely open to the public and certainly to anyone having occasion to visit the mill plant. They often travel upon the public highways.

It is difficult to conceive that under such circumstances any competing manufacturer did not have accurate and complete knowledge of the structure employed by the others. Each proclaimed the superiority of its product, each was necessarily compelled to explain the particular point of alleged superiority of his device over those of his competitors; each naturally would be curious as to what the competitor had done and of what the new competing models would consist. To believe that plaintiff and its executive officers, its salesmen and mechanical department, were not fully conversant with

the details of the structure of the competing machine is to place a heavy burden upon [98] the Master's credulity. To fully accept the denial of knowledge compels one to believe and find that plaintiff in this case failed to do what ordinary prudence, business judgment and common sense would dictate, namely, to avail itself of knowledge which was advertised, and of inspections which were easily and readily available. If it should be conceded that the officers of the company did not know the ACTUAL structural details of Ross and of Willamette Hyster during all these years, they must have been aware that the Ross and Willamette-Hyster machines embodied automatic means for throwing the clutch into neutral and applying the brake to the load lifting mechanism, and inasmuch as plaintiff asserts that the patent includes ANY means, it follows that they must have been aware that the Ross and Willamette carriers infringed the patent.

To use the language of Judge Lurton (sitting with J. J. Taft and Hammond) in *Woodmanse & Hewitt Manufacturing Co. v. Williams*, 68 Fed. 489, 492,—

“Indeed it is not within the range of probability that two rival concerns engaged in selling competitive windmills in the same section of the Union could have been ignorant of the fact that the mills of each contained substantially the same brake mechanism.” [99]

Indulging plaintiff with the possibility that its officers and its assignor might not have had knowledge of defendant Clark & Wilson Lumber Company's alleged infringing use from 1923 until the fall of 1935, still "there devolves upon plaintiff the burden of disclosing impediment to earlier action or of showing, if ignorant of his rights, how he remained ignorant so long."

Window Glass Machinery Co. v. Pittsburgh Plate Glass Co., 284 Fed. 645, 650.

This burden, in the Master's opinion, plaintiff has not sustained. By failure to give notice of infringement and failure to act, it has permitted the defendant Clark & Wilson Lumber Company, during this period of at least twelve years, to purchase eleven Ross carriers and several Willamette-Hyster carriers, and it has likewise permitted the Willamette-Hyster Company to invest large sums of money in plans, equipment and in the manufacture of its carrier.

The Clark & Wilson Lumber Company is a purchaser and user. Its knowledge of plaintiff's patent [100] is constructive only. As to it, plaintiff has been guilty of laches of such character that even had the Master found infringement, plaintiff would not be entitled to relief either for accounting or by way of injunction against further use. No patentee should be granted relief who has permitted an ultimate user to expend large sums of money in the purchase of infringing machines and to use them without objection over a long period of years



without at any time informing such user that the machine so purchased and used was an infringement of the patent.

The Willamette-Hyster Company stands in a somewhat different position; its managing director Grab knew of the existence, the nature and extent of the patent in suit. By this knowledge it is bound. On the other hand, as the Master holds, plaintiff has failed to sustain the burden of proving not only that it was ignorant of the infringement but why and how, under the circumstances, it could be ignorant of it. He finds, therefore, that it had such knowledge. It knew that the Willamette-Hyster Company was an active competitor in its field, that it was investing [101] large sums of money in the development, manufacture, sale and distribution of its carriers. It permitted the Willamette-Hyster Company so to do, making no objection whatsoever for approximately nine years. Its laches, therefore, should prevent its obtaining any accounting for losses, gains or profits, even though plaintiff might otherwise be entitled to an injunction against further infringement. This question, however, becomes academic in view of the fact that the Master finds no infringement.

The Master has refrained from citations of authority because of the length of this report and the fact that they are collated in the briefs and are discussed in the transcribed argument of counsel. He has examined all of the citations given and many others and desires to record his appreciation of the



care and skill with which this case has been presented by counsel on both sides.

Seven days were consumed in the hearings before the Master and he has expended fourteen days' additional time in the consideration of the testimony, the briefs of counsel, the examination of the authorities and the preparation of his report. He prays that his [102] compensation may be fixed and allowed and that the court make suitable order for the payment of these sums allowed.

He transmits to the court a transcript of the testimony and of all exhibits, Nos. 1 to 79 as disclosed by the record, and will make such further reports as the court may from time to time require.

Respectfully submitted,

ROBERT F. MAGUIRE

Master in Chancery.

[Endorsed]: Filed July 1, 1937. [103]

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And Afterwards, to wit, on the 25th day of August, 1937, there was duly Filed in said Court, Plaintiff's Exceptions to the Master's report and Proposed findings and conclusion, in words and figures as follows, to wit: [104]

[Title of District Court and Cause.]

PLAINTIFF'S EXCEPTIONS TO THE MASTER'S REPORT AND PROPOSED FINDINGS AND CONCLUSION.

Dallas Machine & Locomotive Works, Inc., a Corporation, the above named plaintiff, excepts to the report of Robert A. Maguire, Esq., the standing Master, filed in this cause on the 1st day of July, 1937, for the reasons hereinafter specifically pointed out.

Exception No. 1.

To the following statement of the Master on page 7 of his report:

“The machine shown in the patent is a self-propelled carrier containing a lifting device which picks up a load WITHIN and not UPON or in front of its frame, and enabling the load to be picked up, transported, and deposited as desired. None of these things were new in the art when the patentee applied for his patent.”

The plaintiff excepts because this statement is an incomplete and incorrect statement of the nature of the invention involved, and is contrary to the evidence in this cause. [105]

The Master instead ought to have found and certified the following:

## Plaintiff's Proposed Finding

### I.

The invention described by the patent in suit is an improvement of so-called straddle type of lumber carriers.

“The machine shown in the patent is a self-propelled carrier, containing a lifting device, which picks up a load within and not upon or in front of its frame, and enabling the load to be picked up, transported and deposited as desired.” (Master’s report page 7)

“It enabled the operator to straddle the load instead of approaching it from the side or from the end. It enabled loads to be spaced on a loading platform with only sufficient distance between, either laterally or longitudinally, to enable the frame to pass between the piles, and it likewise overcame the necessity of counterweighting the rear end of a front-end hoist to equalize the load to be carried.” (Master’s report page 22)

The specification of the patent in suit (page 1, line 14) states;

“An object of the invention is to provide an improved form of lifting device that will have four lifting points that lift positively and in unison.

Another object is to provide a form of automatic stop for the lifting device that will operate when the limit of movement in either

direction is reached, and also apply a brake [106] mechanism.”

The specification of the patent in suit (page 2, lines 71 to 80) states;

“Any desired form or reversible clutch may be used and any old or common form of brake for the driving mechanism of the lifting device, and therefore it has not been thought necessary to illustrate the details of any specific clutch or brake mechanism. Other details may be varied in their form and location, and in general the invention is intended to be limited only by the scope of the appended claims.”

#### Exception No. 2.

The plaintiff excepts to the following statement of the Master on page 13 of his report:

“The Nicholson patent 1,340,458 (Exhibit 62) issued May 18, 1920, covers a movable freight stacking elevator, which may be self-propelled. It is a front-end hoist, thus differing from the type of carrier shown by Gerlinger’s drawings and specifications. However, it is a carrier with a frame, has load lifting means mounted therein, means of transmitting motion from a source of power to the lifting means to move in either direction; it has automatic means for moving the clutch to neutral upon movement of the load lifting means to a predetermined extent in either direction and means for simultaneously applying a brake whenever the clutch



is in neutral. The only material difference in structure between [107] that shown in plaintiff's patent and the Nicholson machine is that the frame containing the load lifting means is at the front end of the carrier and the load is carried at the front end instead of between the wheels."

### Exception No. 3.

The plaintiff excepts to the following statement of the Master on pages 15 and 16 of his report:

"It will thus be seen that in hoists and elevators, whether stationary or movable, and irrespective of the source or kind of power, long prior to the time of Gerlinger, men had recognized the problem of providing means for automatically limiting upward and downward travel of load lifting means by disconnecting the source of power from the lifting means and simultaneously applying a brake to prevent further movement of those means. Divers kinds of means have been efficiently employed. In each of the cases above referred to, the stopping of upward or downward movement was not dependent upon the presence of a load upon the load lifting means."

### Exception No. 4.

The plaintiff excepts to the following statement of the Master on pages 16 and 17 of his report:

"He (Gerlinger) insists that a lumber carrier is to be distinguished from other carriers

because it connotes a carrier of a particular kind, namely, a straddle type carrier.

The Master is of the opinion that the patentee gained nothing by the use of the term 'lumber [108] carrier'. Carriers of the type in question are adopted for and actually used for elevating, transporting and depositing objects other than lumber. They can and have been used for carrying pipe, cement, bricks and other things. The art involved is that of self-propelled carriers, having load lifting and lowering means."

#### Exception No. 5.

The plaintiff excepts to the following statement of the Master on pages 17 and 18 of his report:

"The art which is to be considered, broadly speaking, is that of hoists and elevators, or more narrowly, that of hoists and elevators mounted on wheels; while most narrowly limited it is that of hoists and elevators on wheels with means of self-propulsion. That all of these things were old does not of itself exclude invention but it definitely limits patentability to improvements in these fields."

The reason for the plaintiff's Exceptions Nos. 2, 3, 4, and 5 is that these statements of the Master are, each of them, an incorrect statement of the nature and classification of the invention covered by the patent in suit. The invention does not concern a mere truck having some sort of wheel-mounted platform body capable of carrying lumber or other

material piled on it, but relates specifically to carriers of the STRADDLE type adapted for use and capable of functioning as stated by the Master in his report on pages 7 and 22.

The Master ought to have found and certified instead [109] the following:

### Plaintiff's Proposed Finding

#### II.

The evidence shows that the combination set forth by claim 4 of the patent in suit specifically concerns and is an improvement upon lumber carriers of the straddle type, which are in a class apart from hoists and elevators, stationary or wheel mounted, and the hoisting mechanism and control thereof described in hoists and elevators does not suggest the building of lumber carriers of the straddle type with load lifting means having four lifting points which lift positively and in unison, and provided with means automatically limiting the movement of the load lifting devices to a predetermined extent in either direction and applying a brake. (See testimony of defendants' expert witness Grab, Trans. of Test. pages 666 and 667.) [110]

#### Exception No. 6.

The plaintiff excepts to the following statement of the Master on page 21 of his report:

“When Gerlinger entered the field, he found self-propelled carriers equipped with hoisting

mechanism adapted to pick up a load and later to deposit the load which was itself carried within the frame members instead of on or in front of the frame. If he added anything, it was merely the means for automatically disconnecting power from the hoist and applying a brake. Carriers of this kind actually consist of two machines, one a self-propelled truck, and the other a hoist."

#### Exception No. 7.

The plaintiff excepts to the following statement of the Master contained on page 8 of his report:

"The problem to which the patentee claims to have addressed himself was the development of means whereby, when the load was lifted, the hoisting mechanism would be stopped automatically at the desired point, the power disconnected therefrom, and the brake applied so as to prevent the settling of the load, and, further, that when the hoisting machine was reversed for the purpose of picking up a load the action would be automatically stopped at a desired point, the power again disconnected and the brake applied; all this without action on the part of the operator."

#### Exception No. 8.

The plaintiff excepts to the following statement of [111] the Master on page 33 of his report:

"The field in which Gerlinger labored was crowded. The necessity for automatic stops and



automatic braking of load-lifting means was as real in stationary load-lifting devices as it was in moveable or self-propelled load-lifting devices. It was as great in a front-end truck carrier as it was in a straddle-frame carrier; it was as real in a carrier having two lifting points as it was in one having four. It existed in a carrier with a positive or rigid lifting means just as it did in one where those means were less positive or non-rigid. Unfortunately, others had seen the problem and others had given an efficient and satisfactory answer.”

#### Exception No. 9.

The plaintiff excepts to the following statement of the Master on pages 24 and 25 of his report:

“Plaintiff attempts to distinguish between defendant’s front end truck and defendant’s straddle type truck by asserting, first, that in the front end truck the load lifting means are not mounted **THEREIN** but that they are mounted **THEREON** or **THEREFROM**. It is further asserted that the claims of his patent shall be limited or confined to carriers having load lifting means mounted in a frame with **FOUR LIFTING** points that lift positively and in unison. Plaintiff contends that thus construed, the Gerlinger patent eliminates front-end trucks having **LESS** than **FOUR** lifting points. The Master, however, can conceive no difference in the problem which would arise in a carrier having four lifting

points and one having a lesser number provided positive means of lifting are used. Nor is it clear that any different problem arises when the load is carried within the frame members from that which exists when the load is carried at the end of the frame members. By positive lifting means the Master understands those which contain no element of friction, such as a drum, and no element of elasticity, such as might be present in a rope or a cable,—means, which, when power is applied, immediately and without variation lift or lower the load. Obviously if such means are to be adopted, automatic stops must be provided, otherwise, the machine will be wrecked.”

#### Exception No. 10.

The plaintiff excepts to the following statement of the Master on pages 25 and 26 of his report:

“Gerlinger says he was the first to combine a hoist with a “O” shaped, self-propelled carrier, and, having done so, he is entitled to a patent monopoly on any device which consists of a “O” shaped self-propelled carrier equipped with a power operated hoist having automatic stops capable of disconnecting power at predetermined points of upward or downward movements and simultaneously applying a brake. He is forced to this position because of the difference in the means disclosed by his patent, its drawings and specifications, and

those employed by the defendant's machine.

[113]

But, given a self-propelled carrier having a "O" shaped frame, having mounted therein a hoist, is it invention to add a well known automatic stop to this apparatus, or is it merely a mechanical improvement?"

Exception No. 11.

The plaintiff excepts to the following statement of the Master on page 32 of his report:

"The only way in which Gerlinger's can be distinguished from the prior art of automatic stops and brakes and hoisting mechanisms is in the load-actuated device. He did not teach the world that lifting mechanisms, with either flexible or rigid lifting means, required automatic stops and automatic brakes. That it had known for years."

Exception No. 12.

The plaintiff excepts to the following statement of the Master on page 23 of his report:

"What he (Gerlinger) said was this:

'Up to the present time straddle trucks, that is, those carrying loads within the frame, have no means of automatically stopping upward and downward movement of the hoist or load lifting means and applying a brake thereto. These are desirable. In my carrier of that type I intend to use a hoist already known which is so equipped.'

But, Gerlinger is not the inventor of means [114] for automatically stopping or automatically braking the upward or downward movement of elevators or hoists."

### Exception No. 13.

The plaintiff excepts to the following statement of the Master on pages 19 and 20 of his report:

"Gerlinger can only claim that he perceived the problem and he provided a NEW or DIFFERENT means of providing it. As has been stated his means differed from his predecessors only in the LOAD-ACTUATED factor, to this he may well be entitled to patent protection; but if so, the defendant's mechanism does not infringe, because it does not utilize such a factor but operates irrespective of the presence of the load.

Having observed that the chain or cable loading mechanisms in straddle type lumber carriers had certain inherent defects which could be remedied by a mechanism of a positive or rigid type such as rackbars and pinion, toggle lifts or screw type, it would seem that a mechanic of ordinary skill would at once appreciate the necessity of providing means to prevent damage to such mechanism should the operator fail to stop the raising or hoisting of the elevator when the proper limits of travel had been reached. Such means in the art of hoists and elevators had already been conceived



and published. In fact both problem and means of solution had been disclosed.” [115]

The reason for plaintiff’s Exceptions Nos. 6 to 13 is that these statements are, each of them, contrary to, and entirely unsupported by the evidence in this cause.

The Master instead ought to have found and certified the following:

Plaintiff’s Proposed Finding  
III.

When Gerlinger entered the field, he found straddle type lumber carriers which utilized cable or chain lifts. Defects were discovered by Gerlinger in that the cable did not give a positive and uniform lift at all four points under all conditions. (Trans. of Test. pages 19 and 20; Master’s report page 7 and comment by Master on claim element 2-a, page 29 of his report.)

Lumber carriers with cable or chain lifts are shown by the patent to Harry B. Ross, No. 1,209,209, dated December 19, 1916 (see plaintiff’s Exhibit 1A, Trans. of Test. page 15); by the Ross patent No. 1,271,947, dated July 9, 1918 (see plaintiff’s Exhibit 1B); by the patent to William A. Overlin, No. 1,289,529, dated December 31, 1918 (see plaintiff’s Exhibit 1C); and by the patent to said Overlin, No. 1,349,292, dated August 10, 1920 (see plaintiff’s Ex-

hibit 1D); (see pages 15 and 16 of Trans. of Test.)

The inefficiency of the straddle type lumber carrier having a cable lift, altho thus present for several years, was not remedied until plaintiff entered the field. Gerlinger conceived improvement in the straddle type lumber carriers of [116] providing rack bars and pinions driven from the power element of the carrier as the lifting means, thus providing a "lifting means that will have four lifting points that will lift positively and in unison". (Patent specification, page 1, line 14; Master's report pages 7 and 29).

This earlier improvement of Gerlinger further provided automatic means whereby the power would be automatically disconnected from the hoisting mechanism when it had operated to a predetermined extent in either direction, but had no automatic means for applying also a brake. On such improvement Gerlinger applied for his patent No. 1,422,958 dated July 18, 1922, entitled Lumber Carriers. (see plaintiff's Exhibit 1, Trans. of Test. page 15.)

The application for this earlier patent was filed August 30, 1921, and was still pending when the application for the patent in suit was filed, which was March 30, 1922.

While Gerlinger was building a lumber carrier of the straddle type according to the said improvement described by patent No. 1,422,-

958, he discovered that, in the course of travel of this carrier, the vibration of the carrier and other factors tended to cause the load lifting mechanism to settle to such an extent that sufficient clearance did not exist between the bottom of the load and the ground. (See Master's report page 7.) To overcome such settling of the load lifting means, Gerlinger then further improved his positive load-lifting means and control thereof by adding an [117] automatic brake, and thereupon filed his application for the patent in suit, No. 1,457,025, dated May 29, 1923. [118]

#### Exception No. 14.

The plaintiff excepts to the following statement of the Master on page 29 of his report:

“The patent (claim sued on) may thus be analyzed:

1. A lumber carrier with a “O” shaped frame; (which he did not invent)

2. Load Lifting means mounted THERE-IN; (which he did not invent); or

2-a. Load lifting means mounted THERE-IN, having FOUR lifting points that lift positively and in unison (which he may well have been the first to conceive)

3. Means for transmitting motion from a source of power to the load lifting means, comprising a clutch that can be set in neutral position or to cause the load lifting means

to move in either direction (which he did not invent);

4. Means for manually moving the clutch (which he did not invent);

5. Automatic means for moving the clutch to neutral position upon the movement of the load lifting means to a predetermined extent in either direction (which were old in the art of hoisting and elevating loads in both stationary or moveable elevators and hoists);

6. Means for braking the transmitting means whenever the clutch is moved to neutral position (which were old in the art of hoisting and elevating loads in both stationary and moveable elevators and hoists).” [119]

Such statement is not a correct analysis of the combination described by claim 4 of the patent sued.

The Master instead ought to have found and certified the following:

#### Plaintiff's Proposed Finding

##### IV.

Claim 4 of the patent is to be analyzed as follows:

1. A lumber carrier with a “O” shaped frame;

2. Load lifting means mounted THEREIN;  
or

2-a. Load lifting means mounted THEREIN, having FOUR lifting points that lift positively and in unison;



3. Means for transmitting motion from a source of power to the load lifting means, comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction;

4. Means for manually moving the clutch;

5. Automatic means for moving the clutch to neutral position upon the movement of the load lifting means to a predetermined extent in either direction;

6. Means for braking the transmitting means whenever the clutch is moved to neutral position.

In determining the patentable novelty of a combination, it is immaterial whether the individual elements thereof are new or old, or whether they coact successively or simultaneously. Invention may consist of uniting the elements in a new means, [120] which renders the combination patentable as an entirety. [121]

#### Exception No. 15.

The plaintiff excepts to the following statement of the Master on pages 31 and 32 of his report:

“If Gerlinger conceived a new combination, it was a combination in the hoist and it is immaterial whether the hoist be moveable or stationary. Automatic stops disconnecting the points of upward and downward movement is not his invention; they are old; means for braking the transmitting means whenever the clutch

connecting the source of power to the load lifting means is moved to neutral is not his invention; it was old. Because of this, his patent is not primary and cannot be accorded a broad construction, but must be limited to the particular means he described and an exceedingly narrow field of equivalents.

If thus limited, it must be defined as an automatic stop actuated by the load itself in upward movement and an automatic stop controlling the downward movement of the kind and character shown by his drawings and specifications. Under this limitation and construction of the patent the defendant's device does not infringe. Defendant achieves cessation of upward movement irrespective of the presence of the load and the means to control the downward movement is substantially different from that described by Gerlinger's plans and specifications. Even if it can be said that defendant's means of downward movement control is a mechanical equivalent of Gerlinger's means for such control, [122] still infringement does not exist because defendant's device omits an essential element of Gerlinger's combination, namely, the LOAD-actuated stop governing upward movement."

The Master instead ought to have found and certified the following:

## Plaintiff's Proposed Finding

## V.

The prior art on which defendants rely for anticipation shows merely some of the elements of the patent claim 4 in suit, but does not show the entire combination of said claim.

Furthermore, these patents are not in the same art as the invention covered by the patent in suit. They would not suggest the building of a straddle type of lumber carrier, and therefore would not suggest the combination described by claim 4 of the patent in suit. (See testimony of Grab, defendants' expert witness, Trans. of Test. pages 666 and 667.)

The defendants concede that the entire prior art, introduced in evidence as anticipation, is in principle of construction and operation the same as that illustrated by the Carr patent, No. 1,407,124, dated February 21, 1922; defendants' Exhibit 69 describing an Elevator Truck (see Trans. of Test. pages 610, 666, and 667). This Carr patent was cited and considered by the Examiner of the Patent Office in passing on patentability of claim 4 of the patent in suit and held not to anticipate the same. (See File Wrapper of Patent [123] in suit, Plaintiff's Exhibit 5, page 17; Trans. of Test. page 27.) The judgment of the Patent Office is entitled to the highest respect and must be presumed to be right. This presumption can only be overcome by clear and convincing proof that it was

wrong. In the instant case, this presumption is strengthened, since all the devices relied on by defendants as anticipating the combination described by claim 4 are in principle of construction and operation the same as illustrated by said Carr patent, which, as stated, was cited and considered by the Patent Office in granting the patent in suit. (See 2 Walker of Patents, 6th Ed. Sec. 525, page 615.)

The defendants having adopted the combination described by claim 4 of the patent in suit therefore cannot deny its utility.

Gerlinger's said earlier patent, No. 1,422,958, was still pending when he filed his application for the patent in suit; therefore said earlier patent may not be cited against, and has no bearing on the patentable novelty in its entirety of the combination stated by claim 4 of the patent in suit. (See *Traitel Marble Co. v. U. J. Hungerford Brass & Copper Co.* 22 Fed. (2d) 259, 260; C. C. A. (2d) 1927.)

The plaintiff and the patentee built but one machine containing a load-actuated upward movement stop bar (No. 67.) It had defects which in actual operation became obvious. If the load [124] was not of sufficient height to engage bar 67 by the time the rackbars had reached the end of their normal travel, or if the load was not properly distributed on the lift, bar 67 would not operate and the hoist mechanism would be subject to damage, due to



upward movement beyond the designed range, thus either stripping the pinion or the rack teeth.

This the patentee and his assignee corrected by eliminating bar 67 and placing the upward movement stop on the rackbar. Exhibit 6 shows the new means which Gerlinger adopted to govern upward movement. No. 91 on the rackbar engaged element No. 90, which in turn engaged bell crank No. 66. The action of Nos. 90, 91 and 66 performed the same function with regard to upward movement of the hoist that Nos. 65 and 66 performed in the downward movement. Nos. 90 and 91 will not be found in the drawings or specifications of the patent, inasmuch as they were adopted after the application had been filed. (Master's report pages 11 and 12)

This modification is included in the thought and objects expressed in the introduction of the patent specification (page 1, lines 14 to 22) and is within the express reservation of changes in detail contained in said patent specification. (Page 2, lines 71 to 80)

It is evident that it was not Gerlinger's purpose to limit the means for controlling the upward movement of the load lifting means by devices actuated only by the load carried by the [125] load lifting means, but to provide broadly automatic means for limiting THE MOVEMENT of the load lifting means to a predetermined extent in either direction and applying the brake. [126]

## Exception No. 16.

The plaintiff excepts to the following statement of the Master on pages 10 and 11 of his report:

“The stops in defendant’s infringing device are not placed on the rackbar, and in fact the device does not use a rackbar. Nor is the stop which limits the upward movement of the hoist **ACTUATED BY THE LOAD**. Defendant’s means for disconnecting the clutch and applying the brake is shown in Exhibits 34, 52 and 56b. As is seen in Exhibit 52, power is transmitted by means of a clutch to a chain and sprocket (shown in yellow), which is fixed at the end of a threaded shaft, which in turn carries a traveling nut (colored in purple). Attached to this nut are suitable levers, which, as the nut is moved along the revolving threaded shaft, change their position, thus lifting or lowering the hoist, depending upon the direction in which the nut moves along the yellow shaft.

Referring now to defendant’s Exhibit 52, which delineates in detail the clutch shifting and braking mechanism, it will be seen that as the nut moves along the shaft it engages stops fixed on a moveable shaft (all colored in red). This action throws the clutch into neutral, disconnecting the power from the hoisting mechanism, and applies the brake (shown in orange).

It is to be remembered that Gerlinger’s stop governing upward movement is actuated **ONLY**

by the load and the downward stop is actuated by a setscrew on the right rear rackbar.” [127]

Exception No. 17.

The plaintiff excepts to the following statement of the Master on page 16 of his report:

“The particular means described by Gerlinger in his drawings and specifications, so far as limitation of upward movement is concerned, is bar No. 67, which is only operative when a load is present and is, at times, inoperative when the load was not sufficiently high, or so placed, or of such character as not to engage and move that bar. The automatic stop of upward movement adapted by the defendant is not dependent upon the presence of a load and is positive in character.”

The Master instead ought to have found and certified the following:

Plaintiff's Proposed Finding

VI.

The defendant's straddle type of lumber carrier embodying load lifting devices and control therefor are the same in principle of operation as those described by claim 4 of the patent in suit. (See Service Manual put out by defendant, Willamette-Hyster Company, constituting plaintiff's Exhibit 12, Trans. of Test. page 287. See further plaintiff's Interrogatory 3 (c) contained on page 3 and plaintiff's Interrogatory

4 contained in defendant's Answer to Plaintiff's Interrogatories, pages 2 and 3, said interrogatories and answers thereto constituting plaintiff's Exhibits 3 and 3-A, Trans. of Test. page 26. See [128] further Master's report page 35.)

Furthermore, the defendants admit infringement of the patent in suit, by paragraph XX, page 10 of their Answer. In this paragraph, the defendants plead laches of plaintiff as a bar to any recovery, accounting, or injunction by the plaintiff, and in order to lay a foundation for this plea, allege as a further and separate defense "that lumber carriers substantially identical in construction and operation with the lumber carriers complained of herein have been made, sold, and widely used throughout the United States of America for more than six years prior to the bringing of this suit". And in response to plaintiff's Motion for Particulars, defendant, Willamette-Hyster Company, admitted it manufactured and sold these lumber carriers. (See plaintiff's Motion for Bill of Particulars and defendant's particulars paragraph 8 (a) (b).)

Such allegation of the answer, because stating facts constituting the basis of defendants' alleged plea of laches constitutes an admission of infringement. [129]

The Master ought further to have found and certified the following:



Plaintiff's Proposed Finding  
VII.

Claim 4 of the patent in suit should be construed so as to give full value to and protect the patented invention rather than to destroy its value. ("Ut res magis valeat quam pereat" quoted in *Eibel Co. v. Paper Co.* 261 U. S. 45, 63.)

Therefore on said admission of defendants and also on the evidence in this case, it must be held that the defendant, Willamette-Hyster Company, infringes upon the patent in suit.

The Master ought further to have found and certified the following:

Plaintiff's Proposed Finding  
VIII.

The straddle type of lumber carrier used by the defendant, Clark & Wilson Lumber Company, has a construction for the control of the lumber lifting devices somewhat different from that employed by Gerlinger and from that employed by the defendant, Willamette-Hyster Company, but is the same in principle of construction and achieves the same result. (Master's report pages 34 and 35; Trans. of Test. page 301) By making and using the straddle type of lumber carriers embodying the combination of claim 4, the defendant, Clark & Wilson Lumber Co. also infringes claim 4. [130]

## Exception No. 18.

The plaintiff excepts to the following statement of the Master on pages 23 and 24 of his report:

“The plaintiff has to a large degree confined the field of inquiry and consideration by stipulating that the defendant’s front-end hoist does NOT infringe the patent.

This carrier (shown in Exhibits 41, 42 and 43) is a carrier adapted to hoisting, transporting, lowering and depositing lumber. It comprises (1) a frame, (2) load lifting means mounted THEREIN, means for transmitting motion from a source of power to the load lifting means comprising (3) a clutch that can be operated manually and set in neutral position or so set as to cause the load lifting means to move in either direction, (4) means for manually moving the clutch to operative position, (5) automatic means for moving the clutch to neutral position upon movement of the load lifting means to a pre-determined extent in either direction and means for braking the transmission whenever the clutch is moved to neutral.

In fact many of the parts comprising the automatic stop and braking means are interchangeable with those on the straddle type carrier manufactured by defendant, which plaintiff contends infringes his patent.”

The Master instead ought to have found and certified the following: [131]

## Plaintiff's Proposed Finding

## IX.

The type of truck built by defendant, Willamette-Hyster Company "shortly before the filing of this suit" (Trans. of Test. page 339) and shown on the exhibit offered by defendants and marked 4' for identification (Ib. 343) shows a "small truck \* \* \* with the load lifting devices across the front end", (Ib. 338), has hoisting mechanism and control therefor, but is not a lumber truck of the straddle type and is not an example of the construction and combination described by claim 4 of the patent in suit, and was therefore conceded by plaintiff not to be an infringement upon said claim. (Ib. 348)

[132]

## Exception No. 19.

The plaintiff excepts to the following statement of the Master on pages 40 and 41 of his report:

"If it should be conceded that the officers of the company did not know the ACTUAL structural details of Ross and of Willamette-Hyster during all these years, they must have been aware that the Ross and Willamette-Hyster machines embodied automatic means for throwing the clutch into neutral and applying the brake to the load lifting mechanism, and inasmuch as plaintiff asserts that the patent includes ANY means, it follows that they must have been aware that the Ross and Willamette carriers infringed the patent.

To use the language of Judge Lurton (sitting with JJ. Taft and Hammond) in *Woodmanse & Hewitt Manufacturing Co. v. Williams*, 68 Fed. 489, 492,—

“Indeed it is not within the range of probability that two rival concerns engaged in selling competitive windmills in the same section of the Union could have been ignorant of the fact that the mills of each contained substantially the same brake mechanism.”

Indulging plaintiff with the possibility that its officers and its assignor might not have had knowledge of defendant Clark & Wilson Lumber Company’s alleged infringing use from 1923 until the fall of 1935, still “there devolves upon plaintiff the burden of disclosing impediment to earlier action or of showing, if ignorant of his rights, how he remained ignorant so long.”

*Window Glass Machinery Co. vs. Pittsburgh Plate Glass Co.*, 284 Fed. 645, 650. [133]

#### Exception No. 20.

The plaintiff excepts to the following statement of the Master on page 41 of his report:

“This burden, in the Master’s opinion, plaintiff has not sustained. By failure to give notice of infringement and failure to act, it has permitted the defendant, Clark & Wilson Lumber Company, during this period of at least twelve years, to purchase eleven Ross carriers and sev-



eral Willamette-Hyster carriers, and it has likewise permitted the Willamette-Hyster Company to invest large sums of money in plans, equipment and in the manufacture of its carrier."

Exception No. 21.

The plaintiff excepts to the following statement of the Master on pages 41 and 42 of his report:

"The Clark & Wilson Lumber Company is a purchaser and user. Its knowledge of plaintiff's patent is constructive only. As to it, plaintiff has been guilty of laches of such character that even had the Master found infringement, plaintiff would not be entitled to relief either for accounting or by way of injunction against further use. No patentee should be granted relief who has permitted an ultimate user to expend large sums of money in the purchase of infringing machines and to use them without objection over a long period of years without at any time informing such user that the machine so purchased and used was an infringement of the patent." [134]

Exception No. 22.

The plaintiff further excepts to the following statement of the Master on pages 42 and 43 of his report:

"The Willamette-Hyster Company stands in a somewhat different position; its managing director Grab knew of the existence, the nature

and extent of the patent in suit. By this knowledge it is bound. On the other hand, as the Master holds, plaintiff has failed to sustain the burden of proving not only that it was ignorant of the infringement, but why and how, under the circumstances, it could be ignorant of it. He finds, therefore, that it had such knowledge. It knew that the Willamette-Hyster Company was an active competitor in its field, that it was investing large sums of money in the development, manufacture, sale and distribution of its carriers. It permitted the Willamette-Hyster Company so to do, making no objection whatsoever for approximately nine years. Its laches, therefore, should prevent its obtaining any accounting for losses, gains or profits, even though plaintiff might otherwise be entitled to an injunction against further infringement. This question, however, becomes academic in view of the fact that the Master finds no infringement."

The reason for plaintiff's Exceptions Nos. 19 to 22 is there is no evidence in the case to support said statements and conclusion, and they are contrary to the evidence in the case.

Furthermore, the plaintiff states that the above named [135] cases cited by the Master on page 40 and 41 of his report and referred to in above Exception No. 19, have no application to the premises because said cases are based on facts showing the presence of inequities which have no existence in

the instant case. This shows merely naked infringement by both defendants with admitted full knowledge of the patent on the part of the defendant, Willamette-Hyster Company, and with no denial of knowledge by the defendant, Clark & Wilson Lumber Company, and with no proof of detriment to either defendant; or proof of reliance upon belief that the patent is invalid based upon any information or advice that the patent is invalid; nor any claim of right on the part of either defendant; nor any proof on the part of either defendant that it would not have made, or sold, or used, the lumber carriers complained of if warned not to infringe by the plaintiff; or of any proof whatsoever that the defendants, or either of them, changed their position or suffered any loss by reason of plaintiff failing to bring this suit earlier; and, proof, on the other hand, by plaintiff that it filed this suit promptly after having actual knowledge of the defendants' infringement.

The testimony shows that defendant, Clark & Wilson Lumber Company, discarded the carriers which it had bought in 1923 and built new carriers embodying the patent in suit, which new carriers went into service November, 1932. (Trans. of Test. page 301) This defendant bought further of these lumber carriers from the defendant, Willamette-Hyster Company, a few of which were received about March 18, 1935. (Ib. page 510) [136]

The Master instead ought to have found and certified the following:



## Plaintiff's Proposed Finding

## X.

Plaintiff from 1922 to 1928 manufactured principally hydraulic lumber carriers of the type described in Gerlinger's patent No. 1,480,-257, dated January 8, 1924. (Plaintiff's Exhibit 14, Trans. of Test. page 68) Plaintiff believed lumber carriers with hydraulic lift had advantages. (Trans. of Test. page 257) Only ten lumber carriers with rack and pinion lift embodying combination of claim 4 of the patent in suit were built between October 21, 1921, and January, 1926. (Trans. of Test. pages 28, 521, and 522) But the hydraulic lift type of lumber carrier was found inefficient and discarded in 1929. (Trans. of Test. page 260) The further building of lumber carriers with rack and pinion lift, having in combination claim 4 of the patent in suit, was resumed about March 5, 1929, when a further delivery of this type of carrier was made. (Trans. of Test. page 390)

The plaintiff specifically denies that it had any knowledge of the infringements complained of in this suit. Except for the testimony of G. A. Grab, the managing director of the carrier department of the defendant, Willamette-Hyster Company, there is no DIRECT proof that the plaintiff had ACTUAL knowledge of the infringements complained of. Grab was employed by Gerlinger and the plaintiff from 1921 to January 1, 1926. \* \* \* When Grab left the



employment of plaintiff, it is evident that some [137] feeling of hostility existed between Gerlinger and himself. He immediately obtained employment with one of plaintiff's competitors, the Willamette Iron & Steel Company, and he is now a highly interested witness. For these reasons, the Master would hesitate to find that plaintiff had antecedent knowledge of Ross's stop and brake mechanism. (Master's report pages 37 and 38)

The defendants admit by the answer to plaintiff's Motion for Bill of Particulars and plaintiff's Interrogatories that there was no conversation between plaintiff and defendants about the infringement complained of in this suit; and that defendants base their plea of laches entirely on plaintiff's failing to bring suit, notwithstanding defendants, Willamette-Hyster Company and its predecessors, were openly manufacturing and selling, and the defendant Clark & Wilson Lumber Company was openly using carriers which infringed upon plaintiff's patent. (See plaintiff's Motion for Bill of Particulars 9 (a), (b) found on page 4 of plaintiff's Motion for Bill of Particulars and the statement found on page 2 of defendants' Answer to Plaintiff's Motion for Bill of Particulars, viz., 9 (a), (b). See further plaintiff's Interrogatory No. 5 (a) and defendants' answer to said Interrogatory No. 5 (a).)

The Willamette-Hyster Company stands in a somewhat different position; its managing

director Grab knew of the existence, the nature and extent of the patent in suit. By this knowledge it is bound. (Master's report page 42)

[138]

Plaintiff first had actual notice of infringement by defendants in September 1935. The circumstances of such notice were, at that time the plaintiff sold two carriers to Shevlin-Hixon, of Bend, Oregon. In connection with this sale, plaintiff was asked to give a guarantee against infringement of patents. This caused plaintiff to make inquiry, since such guarantee had not been demanded in business previously done by Shevlin-Hixon Company with plaintiff. (See order and letter from Shevlin-Hixon Company to plaintiff, being plaintiff's Exhibits 7 and 8, Trans. of Test. page 38.)

Furthermore, in connection with the sale to the Shevlin-Hixon Company of the two carriers, there was a rumor that the plaintiff's carrier was an infringement of the patent rights held by the Willamette-Hyster Company, who were threatening to sue for infringement. (Trans. of Test. page 38) [139]

The Master ought further to have found and certified the following:

#### Plaintiff's Proposed Finding

##### XI.

Thus even if plaintiff were dilatory, as claimed by defendants, in bringing suit against

them for the infringement of plaintiff's patent mere delay in bringing suit on a patent unaccompanied by injury to the defendants does not establish laches. Laches is an affirmative defense, and the burden of proving all the elements essential to establishing this defense rests on the defendants. But no evidence was presented showing any injury to defendants resulting from inaction of the plaintiff in failing to bring this infringement suit earlier. The only proof introduced by the defendant, Willamette-Hyster Company, was that it and its predecessors together, up to the time of bringing this suit, October 3, 1935, manufactured and sold about three hundred infringing lumber carriers. (Trans. of Test. page 551) The gross amount defendant, Willamette-Hyster Company, and its predecessors received from said sales was approximately two million dollars. There was no proof of any money for equipment or otherwise to build these carriers. (Trans. of Test. page 716) It is to be presumed that these three hundred carriers were sold at some profit; thus this defendant was not put to any loss nor suffered any disadvantage by being permitted to manufacture and sell the three hundred carriers before plaintiff brought this infringement suit; but, to the contrary, it is to be [140] assumed that the sale by the defendant, Willamette-Hyster Company, and its predecessors, of the infringing lumber

carriers was to its advantage, bringing back to it its original outlay of capital invested in building these lumber carriers together with some profit on the investment.

The defendant, Willamette-Hyster Company, therefore has failed to sustain its plea of laches.

(Columbia Graphophone Co. v. Searchlight Horn Co. 236 Fed. 135, 139.)

(United Drug Co. v. Ireland Candy Co. 51 Fed. (2d) 226, at page 232.)

(Hamilton-Beach Mfg. Co. v. P. A. Geier Co. (C. C. A. 7) Dec. 21, 1934, 74 Fed. (2d) 992.) [141]

The Master ought further to have found and certified the following:

### Plaintiff's Proposed Finding

#### XII.

With regard to defendant Clark & Wilson Lumber Company, the only evidence introduced shows that this defendant bought two so-called Ross carriers conceded to infringe plaintiff's patent in 1923. (Trans. of Test. page 500) These were continued in service until 1932 "when these carriers got into bad condition" and were dismantled and parts thereof used by Clark & Wilson Lumber Company to build two other straddle type lumber carriers, which were put into service about November, 1932. (Ib. page 301)

It appears that Clark & Wilson Lumber Company bought some straddle type lumber



carriers infringing the patent in suit from defendant, Willamette-Hyster Company, the first of these purchases being delivered about March 18, 1935. Clark & Wilson Lumber Company bought in all eleven more straddle type lumber carriers but introduced no testimony as to when, or from whom bought.

A patent gives to the patentee three exclusive and separable rights, (1) to make, (2) to use, and (3) to sell. The manufacturers and vendors of the Ross carrier are guilty of infringing upon plaintiff's exclusive rights to manufacture and sell the patented invention. The defendant Clark & Wilson Lumber Company have not paid anything to the plaintiff for the right to use these carriers. The Clark & Wilson Lumber Company should now be enjoined [142] from their further use of these carriers, if still workable. No testimony was introduced by defendant, Clark & Wilson Lumber Company, of any loss it would sustain if now enjoined from further use of the said carriers. The defendant, Clark & Wilson Lumber Company should also be enjoined from purchasing and using further carriers infringing upon the plaintiff's patent.

It further is probable, in the absence of denial, that the defendant, Clark & Wilson Lumber Company, was not entirely ignorant of the plaintiff's patent, and that after its said first two lumber carriers were discarded, it was per-

suaded to buy the further infringing lumber carriers by the salesmen of the company from whom it bought. The competitive field in straddle type of lumber carriers is largely occupied by Ross, Willamette-Hyster Company, and the plaintiff. The competition between them is and has been keen. It is to be presumed that each proclaims the superiority of its product, and each was necessarily compelled to explain the particular point of alleged superiority of its lumber carrier over those of its competitors. (Master's report pages 38 and 39)

The plea of laches on the part of defendant Clark & Wilson Lumber Company is thus not sustained. [143]

### XIII.

The conclusion of the Master ought to have been as follows:

The plaintiff is entitled to a decree as prayed for in the complaint herein.

THEODORE J. GEISLER,

Attorney for Plaintiff.

Portland, Oregon,

August 25, 1937

[Endorsed]: Filed August 25, 1937. [144]

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And afterwards, to wit, on the 20th day of September, 1938, there was duly filed in said Court, a Stipulation that further proceedings shall be pursuant to Federal Rules of Civil Procedure, in words and figures as follows, to wit: [146]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated between the parties that further procedure in this case shall be in accordance with the provision of Federal Rules of Civil Procedure, adapted by the Supreme Court of the United States pursuant to the Act of June 19, 1934, Ch. 651.

Dated September 20, 1938.

(Signed) T. J. GEISLER,

Attorney for Plaintiff.

(Signed) AUSTIN F. FLEGEL, JR.,

By P. A. JOSS,

of Attorneys for Defendants.

[Endorsed]: Filed September 20, 1938. [147]

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And afterwards, to wit, on the 6th day of February, 1939, there was duly filed in said Court, an Opinion, in words and figures as follows, to wit:

[148]

[Title of District Court and Cause.]

OPINION

February 6, 1939

James Alger Fee, District Judge:

Plaintiff is the assignee of United States Letters Patent No. 1457025, issued May 29, 1923, to Carl Gerlinger, and relating to lumber carriers. This is a suit for infringement thereof by the defendants, limited by bill of particulars to Claim 4 of the patent, which reads:

“Claim 4 is as follows:

“A Lumber Carrier, comprising

1. A frame;
2. Load-lifting means mounted THEREIN;
3. Means for transmitting motion from a source of power to the load-lifting means, comprising a clutch that can be set in neutral position or to cause the load-lifting means to move in either direction;
4. Means for manually moving the clutch to operative position;
5. Automatic means for moving the clutch to neutral position upon the movement of the load-lifting means to a predetermined extent in EITHER direction;
6. Means for braking the transmitting means whenever the clutch is moved to a neutral position.” [149]

The relief sought consists of (1) declaration of validity of the claim of the letters patent; (2) injunction against infringement and (3) accounting. The principal defenses are (1) lack of infringement in view of the prior art; (2) that the patentee was not the “first, sole, or any inventor or discoverer of the alleged invention”, but that it had been publicly used and sold more than two years prior to the application for patent and its principles are shown in several cited patents prior to that time; (3) that the principles were shown more than two years before that application by the Ross Carrier; (4) that



by reason of the rejection of broad claims by the Patent Office and acquiescence therein by claimant Gerlinger was limited to the precise details set up in the specifications (5) that the Gerlinger device is without utility; (6) that plaintiff was guilty of laches.

The analysis of this patent in the Master's Report is as follows:

“It may serve, in properly analyzing this patent, to state what was the previous state of the art and what the patentee claims to have invented. The machine shown in the patent is a self-propelled carrier, containing a lifting device, which picks up a load **WITHIN** and not **UPON** or in **FRONT** of its frame, and enabling the load to be picked up, transported and deposited as desired. None of these things were new in the art when the patentee applied for his patent.

“These carriers, used originally and principally for the purpose of picking up and transporting piles of lumber, in the earlier stages of development utilized a cable or chain lift. Defects were discovered, in that the cable did not give a positive and uniform lift. The [150] next method of lifting means adopted was rackbars and pinions driven from the power plant of the machine. Gerlinger claims to have been the originator of this kind of a hoist as adapted to a straddle type lumber carrier. In

use it was found that, while the lift was positive and uniform, considerable care was required on the part of the operator manually to disconnect the power from the lifting mechanism when the load had reached the proper height, and that in the course of travel vibration of the machine and other factors tended to cause the mechanism to settle to such an extent that sufficient clearance did not exist between the bottom of the load and the ground.

“The problem to which the patentee claims to have addressed himself was the development of means whereby, when the load was lifted, the hoisting mechanism would be stopped automatically at the desired point, the power disconnected therefrom, and the brake applied so as to prevent the settling of the load, and, further, that when the hoisting machine was reversed for the purpose of picking up a load the action would be automatically stopped at a desired point, the power again disconnected and the brake applied; all this without action on the part of the operator.

“This Gerlinger accomplished. The means disclosed by his patent and his drawings are as follows:

1. To limit upward movement and procure automatic means for moving the clutch to neutral (thus disconnecting the source of power from the hoisting mechanism) and simultaneously applying the brake, he proposed a bar

(No. 67, figure 3 of the patent drawing) moving on a pivot which would be engaged by the top of the load as it was hoisted, with suitable linkage which pushed the [151] clutch into neutral and applied the brake. This linkage and this brake are Nos. 48, 69, 74 and 76 of the patent drawing.

2. On downward movement of the hoist, to procure like automatic disconnection of the clutch and application of the brake, he proposed an adjustable set screw (No. 65) attached to the upper end of the right hand rear rack-bar, which, as the load was lowered, engaged one arm of a ball crank lever, (No. 66), the other end of which lever engaged the rear end of clutch lever No. 64 and in the movement threw the clutch into neutral and simultaneously actuated linkage, 74, which in turn, by means of a cam at its outer end, raised a brake, 76, engaging the shaft, 46, which drives the gears of the lifting mechanism."

The Master found that the principles illustrated in the Gerlinger patent had been previously exemplified in the patents to which reference is made in another portion of his report:

"The Dingee patent 414380 (Exhibit 59) issued November 5, 1889, clearly disclosed such a device. It relates to a stationary elevator or hoist. It discloses a clutch manually operated, by which power is transmitted to the hoisting mechanism and when power is thus applied, up-



ward or downward movement is communicated to the load lifting means; when the load reaches a predetermined position, a projection on the lift engages a stop on a cable by which the clutch is manually operated, throws it into neutral and simultaneously applies the brake. (See Exhibit 60). [152]

“The Nicholson patent 134045 (Exhibit 62) issued May 18, 1920, covers a movable freight stacking elevator, which may be self-propelled. It is a front-end hoist, thus differing from the type of carrier shown by Gerlinger’s drawings and specifications. However, it is a carrier with a frame, has load lifting means mounted therein, means of transmitting motion from a source of power to the lifting means, and a clutch that can be operated manually, set in neutral or so as to cause the load lifting means to move in either direction; it has automatic means for moving the clutch to neutral upon movement of the load lifting means to a predetermined extent in either direction and means for simultaneously applying a brake whenever the clutch is in neutral. The only material difference in structure between that shown in plaintiff’s patent and the Nicholson machine is that the frame containing the load lifting means is at the front end of the carrier and the load is carried at the front end instead of between the wheels.

“The French and Pavey patent, No. 1,360,-917, (Exhibit 64), issued November 30, 1920,



covers a device consisting of a hoist mounted on a truck.

“Lumber or any other portable commodity, within the capacity limits of the truck, can be picked up, hoisted, transported to another place and deposited. It is a FRONT-END truck and in that respect differs from the structure disclosed by plaintiff’s patent to the same extent as does Nicholson’s. The stop which actuates the clutch and throws it into neutral and causes a brake to be applied consists of a nut on a threaded main shaft which engages lugs or collars which, by [153] appropriate connection, throws the clutch into neutral and applies the brake. The operation is similar to that adopted by the defendant. (See Exhibit 65).

“The patent to Towson, et al., 1,337,804, (Ex. 66), issued April 20, 1920, is a self-propelled industrial truck, carrying a load in the front end, having a hoist with limited movement, disclosing automatic means for disconnecting power from the hoisting mechanism and simultaneously applying a brake. It does not disclose a clutch inasmuch as it is an electrically operated machine. The automatic stop merely breaks an electrical contact and thereby disconnects power. (Exhibit 67).

“The Carr patent (Exhibit 69), No. 1407124, issued February 21, 1922, is a self-propelled electrically operated elevator truck with a front-end lift. It contains no clutch but by

making and breaking the electrical contact, connects or disconnects the source of power. It has an automatic brake and by virtue of certain stops, the power is disconnected and the brake automatically applied both at predetermined upper and lower limits of travel."

The Master found, therefore, that the machine set out in Gerlinger's specifications is an aggregation of devices old in the art. He further found that while a combination containing a stopping mechanism actuated by a load was patentable in view of the prior art, a mechanism limiting the travel of the lift at certain set points either upward or downward would not be, and that Gerlinger showed nothing in the patent which would entitle him to a monopoly except a combination including the load stop. Laches of plaintiff was found by the Master to constitute an independent bar to the suit. This cause comes here upon exceptions [154] to these findings.

The field in which the Gerlinger patent was developed is divided into two parts. First, there are the designs relating to elevators and, second, the art relating to self-propelled vehicles. In the Patent Office these two fields are separated for the purpose of detailed examinations, and this seems to have clouded the thinking upon the subject when trucks and elevators were united in one frame. Plaintiff claims that lumber carriers, consisting of lifting means mounted within a straddle carrier, constitute a separate field governed by peculiar

principles and that the developments in the art of elevator or front-end carrier construction are not to be considered. Where a useful principle has been exemplified and belongs to the public domain, no monopoly can thereafter be granted as to that principle.<sup>1</sup> A toy may anticipate a useful industrial device. Where a machine has been invented which works in one material no monopoly can be granted simply because it has been set to work on some different material.<sup>2</sup>

The validity of the Gerlinger patent should be first then considered in relation to the construction of elevators, because the essential elements of the claim in question relate to the operation of a lifting device. Every element in this device was old in that art except the member 67, which stopped the operation of the elevator by the upward pressure of the load. Differentiation between the Gerlinger combination and any prior machine for lifting may thus be established. The prior art, as [155] the Master found, bodied forth many devices for raising loads which contained members limiting the travel to specified points by cutting off the power and applying brakes to the mechanism. It disclosed no elevator designed to stop when the load carried thereby pressed against a designated member. As-

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1. See *E. I. Du Pont de Nemours & Co. vs. Glidden Co.* 1 F. Supp. 1007, 1111; *Howe Machine Company vs. National Needle Company* 134 U. S. 388, 397; *St. Germain vs. Brunswick* 135 U. S. 227, 230.

2. *Ransome Concrete Machinery Co. vs. United Concrete Machinery Co.* 177 Fed. 413.



suming utility, the mechanism was patentable, as an improvement upon the previous devices for load lifting.

The downward movement in the Gerlinger machine was stopped by an entirely different member, acting upon different principles, and not actuated by the load. By the application of purely mechanical skill, the stop on the downward movement could have been constructed, by following the designs of prior patents. This feature was therefore unpatentable alone in a lifting device. Under the specifications, Gerlinger could, as he actually did in practice, have substituted the type of stop on the downward movement for the load actuated stop of the upper movement. However, once this change was made on an elevator, the device would be unpatentable in view of the prior art.

The Gerlinger device does contain a four point independent lift, positively actuated. No differentiation can be seen between this type of lift and a platform lift in elevator construction and that art contains many exemplifications of the platform lift positively actuated. The brake upon the mechanism is also old in the art of construction of load lifting devices. These additions therefore would not render a load lifting device patentable, alone.

There must of course be conceded to a claim of a patent which has been granted, the presumption of validity. In a combination patent, where an element of novelty and supposed utility has been added to one of the constituent devices, the combination



might be patentable. Here, although the device of limiting the upward movement by action of the load positively forced upward against a bar which actuated mechanism to cut off [156] the power and apply a brake was one relating to the art of constructing elevators, it also constituted a patentable novelty in the peculiar combination of elevator and truck known as a straddle lumber carrier if utility were established. So construed the claim is valid. Upon similar principles, if the vital member which brought the mechanism to a stop were omitted the combination would not lay basis for a patent upon an elevator so designed nor would it infringe upon a machine which did contain the load stop.<sup>3</sup> To avoid this, the contention that an elevating device mounted within a straddle carrier constitutes a distinct art, is raised. But elevators and straddle carriers were both old and well known mechanisms before the Gerlinger patents. The latter should therefore be judged as an attempted combination of such mechanisms.

All in all, an elevator is a lifting device and a truck is a carrying mechanism. The function of these mechanisms is independent and diverse. While the form of the truck must be modified to accommodate the elevator and the form of the elevator must be changed to ride upon the truck, the essential function of each respective device remains. The union upon one frame is mechanical. The gearing

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3. *Cimiotti Unhairing Company vs. American Fur Refining Company*, 198 U. S. 399, 410.

of the respective devices to one power shaft is convenient but functionally incidental. When these devices were thus conveniently mounted together, the truck performed no new function. It carried the load and moved backward and forward. The elevator performed no new function. It lifted or lowered the load. Although geared to the same power shaft, these diverse devices did not even act simultaneously. The [157] peculiar qualities of a truck and an elevator were not amalgamated to produce a new or different function or result.<sup>4</sup> A mere aggregation was attained.<sup>5</sup>

This is a clear case for the application of the principle of Grinnell Washing Machine Company vs. E. E. Johnson Company, 247 U. S. 426, where it was held that a gearing device applied to a washing machine whereby the operation of wringing in either direction might be conducted simultaneously with the operation of washing or separately, with one motor, was void for want of invention.

The court there say, quoting *Hailes vs. Van Wormer*, 20 Wall 353, 368:

“It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the re-

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4. *Dilg, et al. vs. George Borgfeldt & Co.* 189 Fed. 588, 590; *Keene, et al. vs. New Idea Spreader Co.* 231 Fed. 701.

5. *Hemming vs. S. Kresage Co.* 24 F. Supp. 981, 983.

sults must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention. No one by bringing together several old devices without producing a new and useful result, the joint product of the elements of the combination and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices, either singly or in other combinations, or, even if a new and useful result is obtained, can prevent others from using some of the devices, omitting others, in combination."

Insofar as the elevating members were anticipated in the previous art relating to elevators, then these would be also anticipated in a lifting device carried within a straddle carrier unless a new function was performed thereby. [158]

There were various forms of carriers of different designs used for carrying lumber before the Gerlinger patents. The "straddle" type carries the load "within" the frame. Other types carry the load "upon" or "in front of" the frame. It is unquestioned that the previous art had shown exam-



ples of an elevator which had a positive means of lifting coupled with a means of limiting the movement in either direction of the load lifting devices, in carriers which transported the load either "upon" or "in front of" the frame. There is some testimony that these devices are different machines from straddle carriers. The plaintiff upon this theory disclaimed the intention of specifying a front end carrier which had all these elements, as infringement. Assuming the previous existence of a straddle carrier and of a truck supporting an elevator "in front of" its propelling mechanism, which exemplified the positive lift, the cut off of power within definite limits and the braking mechanism, it is inconceivable that invention can consist in transposing these elements so that the load is lifted "within" instead of "in front of" or "upon" the carrier.<sup>6</sup>

It seems too clear for argument that where the straddle type of carrier with load lifting devices "within" the frame and other carriers which had load lifting devices "upon" or "in front of" the frame, that nothing more than mechanical knowledge or skill could be required to adapt the "positive lift" and "means of limiting the movement in

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6. "Position and rearrangement of parts are not invention, unless there results therefrom something more than the mere mechanical skill of the mechanic in solving problems confronting him." *Logemann Bros. Co. vs. Galland-Henning Mfg. Co.*, 100 F. 2d 557, 559.



either direction of the load lifting devices'' already in use upon the other types to use upon the straddle type. [159]

In considering the patent involved, therefore, emphasis is laid upon the fact that the device as a whole is a lumber carrier in a "O" shaped frame. But such lumber carriers of the same general construction were old and were commonly designated as "straddle carriers". These had been commonly used in the trade but Gerlinger constructed a new form which was held not to infringe upon the previous devices in the form of the frame. But Gerlinger did not invent the "straddle carrier".

The field of lumber carriers is crowded by parallel invention. Even the specific field of the straddle type carriers is full. Litigation developed over this type of carrier, although the particular features here in issue were not in controversy. This is shown by the fact that Ross sued Overlin in this court upon an infringement of patent No. 1,209,209 relating to the construction of the frame of a straddle type carrier, *Ross vs. East Side Mill & Lumber Co.*, 257 F. 754, and that Overlin sued Dallas Machine & Locomotive Works (plaintiff here) alleging infringement of patent No. 1,289,529 as to the construction of the frame of a straddle lumber carrier by the devices manufactured under patent No. 1,422,958, *Overlin vs. Dallas Machine & Locomotive Works*, 297 F. 7, which is the patent at the basis of this suit. In neither of these cases was the

question of patentability of an elevator mounted on a straddle frame discussed.

Gerlinger then did not attain any end by designating his machine a "lumber carrier" when essentially it was an aggregation of such diverse devices as an elevator and a truck. But even in this limited field he was narrowly circumscribed. It is true that the other "straddle carriers" had ropes or cable lifts and were probably not as efficient as the Gerlinger device. The ropes or wires sagged when a load was carried. But [160] where in the "front end" carriers of Carr a positive platform lift was exemplified there could have been no invention in substitution of this lifting means in the straddle carrier for the rope or wire lifting devices of Ross and Overlin. As pointed out in the file wrapper of the present Gerlinger patent, the rack and pinion lift was a mechanical equivalent to the previous means. Some suggestion is made that a four point independent lift is involved. Ross and Overlin each exemplified a four point lift. The differentiation of the Gerlinger device was in the positive nature of the lifting means. As before noted, there appears no mechanical difference between a positive four point lift and a positive lift on a platform. Neither the rack and pinion nor the four point positive lift is specified in Claim 4 as an essential of the particular combination. A brake in connection with the lifting mechanism is shown in Ross, so that idea was not a new one even with relation to a straddle carrier.

Gerlinger almost immediately abandoned the load actuated limitation on the travels of the rackbars. There is testimony to the effect that it was impracticable in field operations.

Therefore the element of the combination of Gerlinger which indicated patentability is no longer used by plaintiff. Although the Grab patent contains the load actuated stop, the machines actually built or operated by defendants do not. There is no infringement of the peculiar member which gave patentability to the Gerlinger design. While as pointed out above Gerlinger had the right to use the stop shown for the downward movement upon the upward movement also, he therefore lost the peculiar combination upon which the patent was based. The machine built or operated by defendants could have been constructed by the use of mechanical skill only from the designs of the patents for front end carriers or the elevators, cited by the Master. [161]

This brings up the question of laches. It has been proven that plaintiff after the abandonment of the load actuated stop manufactured a few carriers and then turned to the exclusive manufacture of hydraulic carriers. The advertisements as to the latter carrier and the continuous output by plaintiff indicate that Gerlinger believed these were the last word in carrier construction. At any rate in a highly competitive field, the plaintiff entirely disregarded manufacture and use of the machines



which it now claims were infringements. In 1935 there were two developments. First, plaintiff went back to the manufacture of the rack and pinion carrier. Second, plaintiff heard that the defendant Willamette-Hyster expected to sue it for infringement. Thereupon, it is claimed for the first time a detailed examination of the carriers made or operated by defendants was made by the agents of plaintiff.

There are three parties concerned in a patent suit, the patentee, the alleged infringer and the public. In order to promote invention it is proper to grant a monopoly. It is, however, in the interest of the public that as much of the art as possible be released from monopolistic control. While the characteristic of the patent is such that it is possible to look up new developments, damage occurs to the public if another person is permitted over a series of years to place devices upon the market, while a patentee sits idly by and takes no action. Sufficient damage is here shown so that the doctrine of laches is applicable. While the case of *Gillons, et al. vs. Shell Co. of California*, 86 F. 2d 600, may have distinguishing features, the principle is applicable here.<sup>7</sup>

Whether or not there was infringement still laches is a complete bar.

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7. See also *Woodmanse & Hewitt Manuf'g Co. vs. Williams, et al.* 68 Fed. 489, 492; *Window Glass Mach. Co., et al. vs. Pittsburgh Plate Glass Co.*, 284 Fed. 645, 650.



The court affirms the findings of the Master and overrules the exceptions and will enter decree dismissing the suit.

[Endorsed]: Filed February 6, 1939. [162]

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And afterwards, to wit, on Friday, the 30th day of June, 1939, the same being the 98th Judicial day of the Regular March, 1939 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [178]

[Title of District Court and Cause.]

ORDER OVERRULING PLAINTIFF'S EXCEPTIONS AND PROPOSED FINDINGS, AND ORDER ADOPTING MASTER'S REPORT AND SETTING FORTH SPECIFIC FINDINGS OF FACT AND CONCLUSION OF LAW.

The exceptions of plaintiff to the Report on file herein of Robert F. Maguire, Master in Chancery, and plaintiff's Proposed Findings and Conclusion having come on regularly for hearing before the court, the plaintiff being represented by Theodore J. Geisler, attorney for plaintiff, and defendants being represented by Austin F. Flegel, Jr., solicitor and counsel for defendants, and the court having heard, examined, and duly considered the oral argu-

ments of counsel for the respective parties and the briefs submitted in support of their respective positions, and the court having examined and duly considered the records, pleadings, transcript of evidence, exhibits, and Report of the Master on file herein, and having taken the matter under advisement, and being now fully advised:

It Is Now Therefore Ordered that plaintiff's exceptions, and each of them, to the Report on file herein of Robert F. Maguire, Master in Chancery, be and the same are hereby overruled and denied; it is further ordered that the Proposed Findings and Conclusion submitted by the plaintiff be and the same are hereby denied; and it is further ordered that the Report of Robert F. Maguire, Master in Chancery, appointed to take evidence and report his findings of fact, conclusions of law, and recommendations, which Report was filed herein on July 1, 1937, be and the same hereby is accepted and affirmed [179] and said Master's Report hereby is adopted in each and every respect as the findings of fact and conclusions of law of this court, and by way of setting forth specifically and separately the findings of fact and conclusions of law contained in said Master's Report, the court makes the following findings of fact and conclusions of law, to-wit:

### FINDINGS OF FACT

1. That Dallas Machine & Locomotive Works, Inc., plaintiff herein, is and was at all time involved

in this suit the assignee of the entire right, title and interest in and to United States Letters Patent No. 1,457,025, issued May 29, 1923 to Carl F. Gerlinger for Lumber Carrier, and is vested with sufficient title therein to enable it to maintain this suit.

2. That by reason of its bill of particulars, plaintiff, for cause of suit, relies upon the alleged infringement of claim 4 of said Letters Patent No. 1,457,025.

3. That the machine shown and described in said Letters Patent No. 1,457,025 is a self-propelled straddle type truck having a load lifting device mounted within the frame and between the wheels, the lifting mechanism comprising rackbars and pinions creating four lifting points that lift positively and in unison and particularly adapted for hoisting, transporting, lowering and depositing lumber; having also means for transmitting motion from a source of power to the load lifting means comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction, having also means for manually moving the clutch to operative position; having also load actuating means for automatically moving the clutch into neutral position upon movement of the load to a predetermined extent in an upward direction, said load actuated means comprising in part a pivoted bar engageable by the top of the load as it is hoisted, with suitable linkage for moving the clutch into [180] neutral position and applying the



brake; having also means for automatically moving the clutch into neutral position upon movement of the load lifting means to a predetermined extent in a downward direction, comprising an adjustable set screw attached to one of the rackbars and adapted to engage and actuate a bell crank lever which in turn moves the clutch into neutral position and applies the brake; and having means for braking the transmitting means whenever the clutch is moved to a neutral position.

4. That the particular automatic means for moving the clutch to neutral position shown and described in Letters Patent No. 1,457,025 so far as limitation of upward movement is concerned, is the pivoted bar identified by the reference character 67.

5. That the patentee and plaintiff built but one machine as shown and described in said Letters Patent No. 1,457,025, having a load actuated pivoted bar for moving the clutch into neutral position and applying the brake; that this bar was operative only when a load was present upon the load lifting means, and was inoperative when the load was not sufficiently high or was so placed or of such a character as not to engage and move said bar; that thereafter the patentee and his assignee corrected defects which became obvious in actual operation by eliminating the pivoted bar and substituting therefor an element attached to one of the rackbars and adapted to engage and actuate a bell crank which in



turn moved the clutch into neutral position and applied the brake; that the mechanism actually used upon the machines in place of the pivoted bar is not found in the drawings or specification of said Letters Patent No. 1,457,025.

6. That the field in which the Gerlinger invention was developed is divided into two parts, namely, that relating to [181] elevators or lifting devices, and that relating to self-propelled vehicles or carrying devices; that except as they are disposed on or within the same frame they are entirely independent and the essential function of each respective mechanism remains unchanged; that the union upon one frame is mechanical; that the gearing of the respective devices to one power source is convenient, but functionally incidental; that when so united and mounted together, the truck performs no new function, but merely carries the load and moves forward and backward. Neither does the elevator perform any new function, but merely lifts or lowers the load as desired; that the peculiar qualities of a truck and of an elevator were not amalgamated to produce any new or different function or result.

7. That the essential elements of claim 4 of the patent in suit relate to the operation of a lifting device; that in view of the prior art relating to the construction of elevators every element in the Gerlinger device was old in that art, except the load ac-

tuated bar 67 which stopped the operation of the elevator by the upward pressure of the load; that by the application of purely mechanical skill the stop on the downward movement could have been constructed by following the teachings of prior patents; that to have substituted the type of stop on the downward movement for the load actuated stop on the upward movement would be unpatentable in view of the prior art.

8. That the machines built or operated by the defendants could have been constructed by the use of ordinary mechanical skill by the use of structures disclosed and described in prior patents relating to front end carriers or elevators. [182]

9. That in the prior art the patent to Dingee, No. 414,380, issued November 5, 1889, for Elevator, discloses a manually operated clutch by which power may be transmitted to the hoisting mechanism, and when power is thus applied, upward or downward movement is communicated to the load lifting means. Upon movement of the load lifting means to a predetermined extent in either direction, a projection on the lift engages a stop on the cable by which the clutch is automatically operated to cause the cable to move the clutch into neutral position and to simultaneously apply the brake.

10. That in the prior art the patent to Towson et al, No. 1,337,804, issued April 20, 1920, for Industrial Truck, discloses a self-propelled industrial truck having a load lifting means mounted in the

front end thereof, and disclosing automatic means for disconnecting the source of power from the hoisting mechanism and simultaneously applying the brake. Inasmuch as the truck is electrically operated, the automatic stop operates to break an electrical contact and thereby disconnect the source of power from the hoisting mechanism.

11. That in the prior art the patent to Nicholson et al, No. 1,340,458, issued May 18, 1920, for Portable Freight Stacking Elevator, discloses a front end carrier with a frame having load lifting means mounted therein, means for transmitting motion from a source of power to the lifting means, and a clutch that can be operated manually, set in neutral or so as to cause the load lifting means to move in either direction. The machine is equipped with automatic means for moving the clutch to neutral position upon movement of the load lifting means to a predetermined extent in either direction, and means for simultaneously applying a brake whenever the clutch is moved into neutral position. The only material difference in structure between that shown in Letters Patent No. 1,457,025 and the Nicholson machine is that in the latter the frame containing the load lifting means is at the front end of the carrier, whereas, in the patent in suit the load lifting means is mounted between the wheels. [183]

12. That in the prior art the patent to French et al, No. 1,360,917 issued November 30, 1920, for Elevating and Conveying Apparatus, discloses the



combination with a truck of a load lifting means mounted in a frame on the front end of the truck. The stop which actuates the clutch and throws it into neutral and causes the brake to be applied consists of a traveling nut on a threaded main shaft which engages lugs or collars which operate, by appropriate connection, to throw the clutch into neutral and apply the brake. The operation is similar to that adopted by the defendants.

13. That in the prior art the patent to Carr, No. 1,407,024, issued February 21, 1922, for Elevator Truck, discloses a self-propelled electrically operated elevator truck with a front end lift. The device does not employ a clutch, but means for making or breaking the electrical circuit connects or disconnects the source of power from the load lifting mechanism. It has an automatic brake and by virtue of certain stops the power is disconnected and the brake applied automatically at predetermined upper and lower limits of travel.

14. That in no one of the prior art patents is there shown or described automatic means for moving the clutch to neutral position which is dependent upon the presence of a load upon the load lifting means, and that only in this respect, i. e., the load actuated factor, does the means shown and described in Letters Patent No. 1,457,025 differ from the disclosures of the prior art.

15. That the carrier shown in photographs identified as defendants' exhibits 42 and 43, is a carrier



adapted to hoisting, transporting, lowering and depositing lumber. It comprises, (1) a frame; (2) load lifting means mounted therein; (3) means for transmitting motion from a source of power to the load lifting means, comprising a clutch that can be set in neutral position or so set as to cause the load lifting means to move in either direction; (4) means for manually moving the clutch to operative position; (5) automatic means [184] for moving the clutch to neutral position upon movement of the load lifting means to a predetermined extent in either direction; and (6) means for braking the transmission means whenever the clutch is moved to a neutral position.

16. That the carrier shown in photographs identified as defendants' exhibits 42 and 43 is manufactured and sold by defendant Willamette-Hyster Company, and that many of the parts thereof, comprising the automatic stop, reversing clutch and braking means, are interchangeable with those on the straddle type carrier manufactured by defendant Willamette-Hyster Company which plaintiff contends infringes claim 4 of said Letters Patent No. 1,457,025.

17. That because of the record admission by the plaintiff during the course of the trial that defendant Willamette-Hyster Company's front end carrier shown in photographs identified as defendants exhibits 42 and 43 does not constitute an infringement of claim 4 of the patent in suit, there being

verbal correspondence between the claim and the said front end carrier, it follows that the invention defined by claim 4 of the patent in suit must be restricted to the form of load actuated mechanism for moving the clutch shown and described by the patentee Carl F. Gerlinger.

18. That that which was in fact the invention of the patentee Carl F. Gerlinger was an automatic stop actuated by the load itself in upward movement, and an automatic stop controlling the downward movement of the kind and character shown by his drawings and specification.

19. That defendants achieve cessation of the upward movement of the load lifting device irrespective of the presence of a load, and the means to control the downward movement of the load lifting device is substantially different from that shown and described in said Letters Patent No. 1,457,025. Even if it can be said that defendants' means of downward movement control is a mechanical equivalent of the means for such control disclosed in the patent in suit, [185] still infringement does not exist because defendants' device omits an essential element of Gerlinger's combination, namely, the load actuated stop governing upward movement.

20. That the lumber carriers manufactured and sold by defendant Willamette-Hyster Company did not utilize a load actuated means for causing cessation of the upward movement of the load lifting device.

21. That the lumber carriers in use by the defendant Clark & Wilson Lumber Company do not utilize a load actuating means for causing cessation of the upward movement of the load lifting device.

22. That the lumber carriers manufactured and sold by defendant Willamette-Hyster Company did not constitute an infringement of claim 4 of the patent in suit.

23. That the lumber carriers in use by defendant Clark & Wilson Lumber Company do not constitute an infringement of claim 4 of the patent in suit.

24. That the patent in suit, Letters Patent No. 1,457,025, issued May 29, 1923 on an application filed March 30, 1922, and that plaintiff's bill of complaint herein was exhibited October 3, 1935.

25. That as early as September, 1923, defendant Clark & Wilson Lumber Company purchased two Ross carriers, both of which have ever since been in constant use; that each of these carriers is a straddle type with load lifting means mounted in the frame between the wheels, the lift having four lifting points that work positively and in unison; that each carrier is equipped with a manually operated clutch which can be placed in neutral and which can be operated to move the lift in either direction; that each carrier has means which, when the lift has reached a predetermined point in upward or down-



ward movement, moves the clutch into neutral position and applies a brake to the load lifting means.

[186]

26. That the device alleged to infringe claim 4 of the patent in suit was first designed and constructed by the Willamette Iron & Steel Company in September, 1926; that the defendant Willamette-Hyster Company succeeded to the carrier business of the former in 1929; and that both companies, during their respective periods of operation, continuously manufactured and sold the alleged infringing device.

27. That the gross amount of defendant Willamette-Hyster Company's sales of the alleged infringing carrier is approximately \$2,000,000.00.

28. That the market for straddle type carriers is largely confined to saw mills and lumber yards; that the competitive field is largely occupied by Ross, defendant Willamette-Hyster Company, and plaintiff; that the competition between them is and has been keen; that at least as early as December, 1925, the Ross company advertised its carriers in the trade journals; that the machines of the defendant Willamette-Hyster Company and its predecessor, Willamette Iron & Steel Company, have been advertised in trade journals and in public use since September, 1926; that when in use these carriers travel through lumber yards and over loading platforms, and often upon the public highways; that in each type of machine the automatic stops are in plain



view and the automatic brake is likewise visible to casual inspection by anyone having occasion to visit the mill plant; that under such circumstances each competing manufacturer must have attained accurate and complete knowledge of the structure employed by the others; that the circumstances were such as to put the plaintiff upon inquiry; that if plaintiff was in fact ignorant of the alleged infringement, it failed to use reasonable diligence to inform itself of all of the facts; that there is imputed to the plaintiff accurate and complete knowledge of the structural details of the alleged infringing devices, and an awareness that said alleged infringing devices embodied and/or employed the alleged invention broadly defined by the terms of claim 4 of Letters Patent No. 1,457,025. [187]

29. That plaintiff has failed to sustain the burden of disclosing any impediment to earlier action or of showing how it could have remained ignorant of its rights for so long a period of time, or of showing that it was ignorant of the alleged infringement. It is found, therefore, that plaintiff had knowledge of the alleged infringement of defendants for more than six (6) years prior to the bringing of this suit.

30. That if defendant Clark & Wilson Lumber Company had knowledge of said Gerlinger patent No. 1,457,025, its knowledge was constructive only; that defendant Willamette-Hyster Company had knowledge of said Gerlinger patent.

31. That by its failure to give notice of infringement and failure to act, plaintiff has permitted defendant Clark & Wilson Lumber Company to expend large sums of money in the purchase of allegedly infringing machines and to use said machines constantly without objection during a period commencing over twelve (12) years prior to the bringing of this suit.

32. That by its failure to give notice of infringement and failure to act, plaintiff has permitted defendant Willamette-Hyster Company (and its predecessor in interest, Willamette Iron & Steel Company) to invest large sums of money in the development, manufacture, and distribution of its carriers, making no objection for approximately nine (9) years prior to the commencement of this suit.

33. That even if infringement existed as alleged, plaintiff is guilty of laches with relation to each of the defendants.

### CONCLUSIONS OF LAW

1. That the patentee, Carl F. Gerlinger, was not the first, sole, or any inventor or discoverer of the invention defined by claim 4 of the patent in suit, but that said alleged invention, and all material and substantial parts thereof, had been put into public [188] use at dates more than two years before the said Carl F. Gerlinger filed his application for the patent in suit.

2. That the invention defined by claim 4 of the patent in suit was not novel or patentable at the

time of the alleged invention thereof by Carl F. Gerlinger, and that the subject matter of said claim and all material and substantial parts thereof had been known, used, invented and described and published in and by the following United States Letters Patent prior to the alleged invention or discovery thereof by the said Carl F. Gerlinger and for more than two years prior to the date of filing of the application for said patent:

Dingee	414,380	Nov. 5, 1889
Towson et al	1,337,804	Apr. 20, 1920
Nicholson et al	1,340,458	May 18, 1920
French et al	1,360,917	Nov. 30, 1920
Carr	1,407,124	Feb. 21, 1922

3. That because of the state of the prior art said Letters Patent No. 1,457,025 was not primary in character and cannot be accorded a construction broad enough to include all means for obtaining the desired result, but must be limited to the new means disclosed in said patent and an exceedingly narrow range of mechanical equivalents.

4. That claim 4 of the patent in suit is couched in language broad enough to cover combinations of elements found in the prior art, and that said claim 4, to be construed as valid, must be restricted to the particular form of device disclosed and described in the drawings and specification of the Gerlinger patent.

5. That claim 4 of the patent in suit is so restricted and limited by the disclosures of the prior



art that it does not cover the structure of the carriers manufactured and sold by the defendant Willamette-Hyster Company, or used by the defendant Clark & Wilson Lumber Company.

6. That the lumber carriers manufactured and sold by the defendant Willamette-Hyster Company, and/or used by the defendant Clark [189] & Wilson Lumber Company, did not differ from those disclosed and described in Letters Patent prior in time to the patent in suit.

7. That claim 4 of the said Letters Patent No. 1,457,025 defines a device consisting of several component parts or previously known elements in which each element remains unchanged in function or effect and its action is unaffected except incidentally by the union; the final result thereof being the mere adding together of the separate contributions of the various component elements rather than the production of any new or different function or result.

8. That nothing more than mechanical knowledge or skill was required to adapt the positive lift and means for limiting the movement in either direction of load lifting devices already in use upon other types of carriers to the type of carrier disclosed and described in the patent in suit.

9. That the lumber carriers manufactured and sold by defendant Willamette-Hyster Company did not constitute an infringement of claim 4 of the patent in suit.



10. That the lumber carriers in use by defendant Clark & Wilson Lumber Company do not constitute an infringement of claim 4 of the patent in suit.

11. That the plaintiff Dallas Machine & Locomotive Works, Inc., is guilty of laches for its long neglect to assert any right against these defendants and is barred from any recovery in this suit.

12. That the defendants are entitled to a decree dismissing plaintiff's suit.

13. That said decree should award defendants judgment for their taxable costs and disbursements herein and provide that execution issue therefor.

Dated this 30th day of June, 1939.

JAMES ALGER FEE

Judge

[Endorsed]: Filed June 30, 1939. [190]

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And afterwards, to wit, on Friday, the 30th day of June, 1939, the same being the 98th Judicial day of the Regular March, 1939 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [191]

In the District Court of the United States for the  
District of Oregon.

No. E-9581

DALLAS MACHINE & LOCOMOTIVE WORKS,  
INC., a corporation,

Plaintiff,

vs.

WILLAMETTE-HYSTER COMPANY, a corpo-  
ration, and CLARK & WILSON LUMBER  
COMPANY, a corporation,

Defendants.

### FINAL DECREE

This cause, having come on to be heard at final hearing upon pleadings and proof taken and filed on behalf of both parties herein, and counsel for the respective parties having been heard, and due consideration having been had, and findings of fact and conclusions of law having been made and entered, and thereupon, upon consideration thereof, it is

Ordered, Adjudged and Decreed as follows:

1. That the above entitled suit be, and the same hereby is dismissed.

2. That the defendants have and recover from plaintiff Dallas Machine & Locomotive Works, Inc., the taxable costs of the defendants Willamette-Hyster Company and Clark & Wilson Lumber Company in this court, and that said defendants shall

have judgment and execution against the said plaintiff for said costs.

Dated this 30th day of June, 1939.

JAMES ALGER FEE

Judge

[Endorsed]: Filed June 30, 1939. [192]

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And Afterwards, to wit, on the 10th day of August, 1939, there was duly Filed in said Court, a Notice of appeal, in words and figures as follows, to wit: [193]

[Title of District Court and Cause.]

#### NOTICE OF APPEAL

The plaintiff, Dallas Machine & Locomotive Works, Inc., a corporation, in the above entitled cause hereby appeals from the final decree and judgment therein entered, June 30, 1939, in favor of the above named defendants, Willamette-Hyster Company, a corporation, and Clark & Wilson Lumber Company, a corporation, and from each and every part of said decree and judgment to the Circuit Court of Appeals for the Ninth Circuit.

And the plaintiff, desiring a stay of said judgment pending said Appeal and until the final determination thereof, presents herewith its bond in the sum of Fifteen Hundred (\$1500.00) Dollars for approval by the Court.

Dated August 5th, 1939.

T. J. GEISLER

Attorney for Plaintiff

[Endorsed]: Filed August 10, 1939. [194]

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And Afterwards, to wit, on the 10th day of August, 1939, there was duly Filed in said Court, a Bond on appeal, in words and figures as follows, to wit: [195]

[Title of District Court and Cause.]

#### BOND ON APPEAL

Know All Men by These Presents, that the undersigned Dallas Machine & Locomotive Works, Inc., a corporation of the State of Oregon, having its principal place of business at Dallas, Oregon, as principal, and V. O. Williams of Dallas, Oregon as surety, are held and firmly bound unto the above-named defendants, Willamette-Hyster Company, a corporation and Clark & Wilson Lumber Company, a corporation, in the sum of Fifteen Hundred (\$1500.00) Dollars; to be made to the defendants, and for which payment, well and truly to be paid, the undersigned bind themselves jointly and severally by these presents.

Signed and sealed this 5th day of August, 1939.

Whereas, in the District Court of the United States, for the District Court of Oregon, in a suit pending therein, entitled Dallas Machine & Loco-



motive Works, Inc., a corporation, Plaintiff, vs. Willamette-Hyster Company, a corporation and Clark & Wilson Lumber Company, a corporation, Defendants, a decree and judgment was rendered on June 30, 1939 against the plaintiff for the sum of One Thousand Two Hundred Twenty-Four and 05/100 (\$1,224.05) Dollars costs allowed the Defendants, and the Plaintiff has duly filed a Notice of Appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit with the Clerk of said District Court as provided by Rule 73 of the Federal Rules of Civil Procedure:

[196]

Now Therefore, the condition of the above obligation is such that if the plaintiff shall satisfy said decree and judgment in full together with costs and interest if for any reason the appeal is dismissed, or if the decree and judgment is affirmed also shall satisfy in full such modification of said judgment and such costs and interest as the Appellant Court may adjudge and award, then the above obligation is to be void; else said obligation is to remain in full force and virtue.

DALLAS MACHINE &

LOCOMOTIVE WORKS, INC.,

[Seal] By W. E. BALLANTYNE

Principal

Secty-Treas

V. O. WILLIAMS

Surety

United States of America

District of Oregon—ss.

I, V. O. Williams, the surety named in the foregoing Bond of Appeal, being first duly sworn, depose and say: That I am a resident of and a freeholder within said District; that I am not a counselor or attorney-at-law, nor Clerk of any Court, or Officer of any Court, and that I am worth the sum of Fifteen Hundred (\$1500.00) Dollars, over and above all debts and liabilities, and exclusive of property exempt from execution.

V. O. WILLIAMS

Subscribed and sworn before me this 5 day of August, 1939.

[Seal]

DORIS FULLY

Notary Public for Oregon

My commission expires March 29, 1940. [197]

The above Supersedeas Bond of Plaintiff on appeal is hereby approved.

August 10th, 1939.

CLAUDE McCOLLOCH

United States District Judge.

[Endorsed]: Filed August 10, 1939 [198]

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And Afterwards, to wit, on the 6th day of October, 1939, there was duly Filed in said Court, Appellant's Amended Designation of contents of rec-

ord on appeal, in words and figures as follows,  
to wit: [199]

[Title of District Court and Cause.]

APPELLANT'S AMENDED DESIGNATION  
OF WHAT SHALL BE CONTAINED IN  
THE RECORD ON APPEAL.

The above named Plaintiff (Appellant), in compliance with Rule #75 of the Federal Rules of Civil Procedure, hereby designates the following portions of the record, proceedings and evidence in the above entitled cause which shall be contained in the Record on Appeal of this cause to the Circuit Court of Appeals for the Ninth Circuit, viz:

1. The Complaint.

(Note: Exhibit A of Complaint being a copy of the Patent in Suit is omitted because this patent was introduced as plaintiff's Exhibit 2 on the trial of this case, (See Reporter's Transcript of Testimony, Page 25.)

2. Defendants' Motion for a Bill of Particulars to be furnished by plaintiff, and the Plaintiff's Response thereto.

3. Defendants' Answer to the Complaint.

4. Order Allowing Plaintiff's Motion for Bill of Particulars to be furnished by defendants.

5. Plaintiff's Motion for Bill of Particulars as allowed, and Defendants response thereto.

6. Order Allowing Plaintiff to file interrogatories to be answered by officers of defendants' Corporations.

7. Stipulation Withdrawing Defendants' Objections to Interrogatories and that Defendants Answered the same. [200]

8. Plaintiff's Interrogatories and the Defendants' Answers thereto.

9. The order of reference of the cause to the Standing Master.

10. The Master's Report.

11. The Plaintiff's Exceptions to the Master's Report.

12. Stipulation that further proceedings shall be pursuant to Federal Rules of Civil Procedure.

13. The opinion of the Court.

14. Order Overruling Plaintiff's exceptions, defendants' proposed findings;—an Order adopting Master's Report and setting forth specific findings of fact and conclusions of law.

15. Plaintiff's objections to proposed findings and conclusions of law submitted by the defendants.

16. Plaintiff's Proposed findings of fact and conclusions of law which the Court refused to allow.

17. Final Decree.

18. Plaintiff's Notice of Appeal.

19. Plaintiff's Bond on Appeal.

20. A statement of the evidence taken from the Reporter's Transcript of Evidence as filed by the Master with his report, omitting from said transcript all matter not essential to the Decision of the questions presented by the Appellees.



21. Orders extending time to file Transcript with the Appellant Court.

Copies of the papers above referred to and to be contained in the Record on Appeal are hereto attached.

Dated, October 4th, 1939.

T. J. GEISLER

Attorney for Plaintiff,  
(Appellant).

Service of foregoing Amended Designation Admitted: October 6th 1939.

REYNOLDS, FLEGEL &  
SMITH,

By P. A. JOSS

Attorneys for Defendants.

[Endorsed]: Filed October 6, 1939 [201]

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And Afterwards, to wit, on the 18th day of October, 1939, there was duly Filed in said Court, a Stipulation to transmit the original exhibits to the Circuit Court of Appeals, in words and figures as follows, to wit: [202]

[Title of District Court and Cause.]

#### STIPULATION

It is hereby stipulated by the above-named plaintiff-Appellant, and the Defendants-Appellees, that an Order be entered in this cause in this Court, di-

recting the Clerk of this Court to transmit to the Clerk of the Court of Appeals of the Ninth Circuit at San Francisco, California, the following Original Exhibits:

#### List of Exhibits

(Note: The star placed before the designated Exhibit indicates that such Exhibit is to be reproduced as hereinbelow stipulated.)

\*Pl'ff's. Exhi. 1—Gerlinger's Pat. No. 1,422,958, dated July 18, 1922, for Lumber Carrier.

Pl'ff's. Exhi. 1-A—Ross Patent, No. 1,209,209, dated Dec. 19, 1916, Motor Truck. (For copy of this Pat., see Defendants' Exhibit 78.)

\*Pl'ff's. Exhi. 1-B—Ross Pat., No. 1,271,947, July 9, 1918, on Portable Elevator.

\*Pl'ff's. Exhi. 1-C—Overlin Pat. No. 1,289,529, dated Dec. 31, 1918, on Truck.

\*Pl'ff's. Exhi. 1-D—Overlin Pat. No. 1,349,292, dated Aug. 10, 1920 on Lumber Truck.

\*Pl'ff's. Exhi. 2—Gerlinger's Pat. No. 1,457,025, dated May 29, 1923, on Lumber Carriers.

Note: Plaintiff's Exhi. 3 being pl'ff's. Interrogatories put to the officers of Defendants and Plaintiff's 3-A being defendants' Answer to the interrogatories are included by designated excerpts thereof in the body of the designated Record on Appeal.

\*Pl'ff's. Exhi. 4—File wrapper of Gerlinger Pat. 1,422,958. [203]

\*Pl'ff's. Exhi. 5—File wrapper of Pat. in suit, 1,457,025.

\*Pl'ff's. Exhi. 6—Drawing of Load-lifting means and control of same embodied in Pl'ff's. Lumber Carriers, Nos. 2, 3, and 4.

Pl'ff's. Exhi. 7—Order of Shevlin-Hixon Company of September 3, 1935.

\*Pl'ff's. Exhi. 8—Letter of Shevlin-Hixon Company to Pl'ff. of Sep. 11, 1935.

Pl'ff's. Exhi. 9, 10 and 11—Pencil sketches of drawings sent to Gerlinger's Pat. Atty. at Wash. from which to prepare drawings for the Pat. in suit.

\*Pl'ff's. Exhi. 12—Assignment of Patent in suit to be omitted and in lieu thereof, state the following Abstract., to be included in the printed Transcript of Record on Appeal.

Assignment Carl F. Gerlinger to Dallas Machine & Locomotive Works, Inc., dated July 2, 1928.

Patents Nos. 1,422,958 date of issue July 18, 1922

1,457,025 “ “ “ May 29, 1923

1,480,257 “ “ “ Jan. 8, 1924

1,609,018 “ “ “ Nov. 30, 1926

1,618,330 “ “ “ Feb. 22, 1927

Recorded, Transfers of Patents, U. S. Patent Office, July 6, 1928, Liber N—135, Page 43.

Pl'ff's. Exhi. 13—Model of Gerlinger lumber carrier claimed by pl'ff. to illustrate Patent in suit.

\*Def'nts. Exhi. 14—Gerlinger's Hydraulic Carrier Pat., 1,480,257, dated Jan. 8, 1924.

\*Def'nts. Exhi. 15, 16, and 17—two sheets, 18, 19, 20, 21, 22, 23, and 24, being certain Advertisements which appeared in "The Timberman" from 1924 to 1929 of Lumber Carriers.

\*Def'nts. Exhi. 25—Enlargement of drawings of Pat. in suit.

\*Pl'ff's. Exhi. 26—Enlargement of Sheet 1 of Drawings of Pat. in suit.

\*Pl'ff's. Exhi. 27—Enlargement of Sheet 2 of drawings of Pat. in suit.

Pl'ff's. Exhi. 28—May be omitted. [204]

Pl'ff's. Exhi. 29—Photographs of lumber carriers No. 2 and 3 built by Pl'ff.

Pl'ff's. Exhi. 30—Photograph of Pl'ff's. machine taken in 1922.

\*Pl'ff's. Exhi. 31—Photograph of Lifting Mechanism from which the drawing, Pl'ff's. Exhi. 6 was made.

Pl'ff's. Exhi. 32—Service Manual of Defendant, Willamette-Hyster Company.

\*Pl'ff's. Exhi. 33—Enlargement of Drawing No. 1, on Page 4 of said Manual.

\*Pl'ff's. Exhi. 34—Enlargement of Drawing No. 2, on Page 5 of said Manual.

\*Pl'ff's. Exhi. 35—Photograph of Cottage Grove Machine built by Willamette-Hyster Company.

Pl'ff's. Exhi. 36—Photograph of Clutch Automatic Brake and Portions of Control included in Drawing in Pl'ff's. Exhi. 6.



Pl'ff's. Exhi. 37—A detailed sketch made by witness Dimick in explaining drawings of pat. in suit.

\*Def'nts. Exhi. 38-A, 38-B, and 38-C.—Photographs of Def'nt. Clark & Wilson Co.'s 1923 Ross machine.

Note: Def'nts. Exhi. 39 and 40 withdrawn.

\*Def'nts. Exhi. 41—Circular of Willamette-Hyster Co.

\*Def'nts. Exhi. 42—Photograph of Willamette-Hyster Co. Front End lift truck.

\*Def'nts. Exhi. 43—Another photograph of the same truck with one wheel removed.

\*Def'nts. Exhi. 44-A, 44-B, and 44-C.—Photographs of pl'ff's. lumber carrier as built by plaintiff.

\*Def'nts. Exhi. 45—Sheets 1 to 9 inclusive of record of the Gerlinger Lumber carrier known as RPF manufactured by pl'ff.

\*Pl'ff's. Exhi. 46—3 sheets of record of sales of Pl'ff. mechanical lift carriers designated as RP.

\*Pl'ff's Exhi. 47—Grab Pat. 1,838,939, Lifting Mechanism for Traversing Hoists dated Dec. 29, 1931.

\*Pl'ff's. Exhi. 48—Enlargement of Fig. 5 of drawing of Grab patent. [205]

Pl'ffs. Exhi. 49 and 50 being copies of Assignments of Grab Patent to Willamette-Ersted Company are to be omitted and in lieu thereof state the following Abstract to be included in the printed Transcript of Record on Appeal.

\*Abstract of Plaintiffs Exhi. 49.

Assignment of Gustav A. Grab to Willamette Iron & Steel Works, dated August 31, 1927, of Lifting Mechanism for Traversing Hoists, described in the specification executed July 2, 1927, filed July 23, 1927, Ser. No. 207,873, renewed under Ser. No. 455,927, filed May 26, 1930.

Recorded in Transfers of Patents, United States Patent Office, Nov. 30, 1931, Liber V—150—Page 661.

\*Abstract of Pl'ffs. Exhi. 50.

Assignment by Willamette Iron & Steel Works to Willamette-Ersted Company, dated March 29, 1929, of Lifting Mechanism for Traversing Hoists described in specification filed July 23, 1927, Ser. No. 207,873.

Recorded in Transfers of Patents, United States Patent Office, Nov. 30, 1931, Liber V—150—Page 662.

\*Pl'ffs. Exhi. 51—File wrapper of Grab pat., 1,838,939, on Dec. 29, 1931.

\*Def'nts. Exhi. 52—Photo of mechanism contained in Willamette-Hyster Lumber Carrier.

\*Def'nts. Exhi. 53—Two pages from Record Book kept by witness Hale.

\*Def'nts. Exhi. 54—Further Records from same Book.

\*Def'nts. Exhi. 55—Photograph of No. 2 Ross Carrier stop mechanism used at Clark & Wilson Lumber Company's Mill.

\*Def'nts. Exhi. 56-A and 56-B—Photographs of Clark & Wilson Company's Willamette-Hyster Machine No. 1.

\*Def'nts. Exhi. 57—An Assembly of one copy of each of the prior art references (patents) cited during the prosecution of the application for the patent in suit.

These Patents were as follows: [206]

\*Dobson Patent, No. 557,776 dated Apr. 7, 1896 on Combined Starting & Stopping & Reversing Gear for Hoists, etc.

\*Evans Pat., No. 846,837, dated Mar. 12, 1907 on Traveling Crane.

\*Hatfield Pat., No. 889,678, dated June 2, 1908 on Shock Absorber for Self-Propelled Vehicles.

\*Brunelle Pat., No. 1,054,900 dated Mar. 4, 1913 on Elevator.

\*Clark Pat., No. 1,069,228 dated August 5, 1913, on Vehicle.

\*Benton Pat., No. 1,092,088, dated Mar. 31, 1914, on Log Lifting & Hauling Machine.

\*Winkley Pat., No. 1,163,799, dated Dec. 14, 1915, on Stop Mechanism.

\*Hely Pat., No. 1,186,188, dated June 6, 1916, on Automatic Power Cut Off.

\*Clark Pat., No. 1,200,411, dated Oct. 3, 1916, on Loading Device for Auto Trucks.

Ross Pat., No. 1,271,947, dated July 9, 1918, on Portable Elevator, being pl'ff's. Exhi. 1-B (which see)

Overlin Pat. No. 1,289,529, dated Dec. 31, 1918 on Truck. (being pl'ffs. Exhi. 1-C (which see).

\*Overlin Pat., No. 1,323,719, dated Dec. 2, 1919, on Load Lifting Mechanism for Motor Trucks.

\*Sproul Pat., No. 1,326,984, dated Jan. 6, 1920, on Elevator.

Carr Pat., No. 1,407,124, dated Feb. 21, 1922 on Elevator Truck, being def'nts. Exhi. 69 (which see)

Gerlinger Pat., No. 1,422,958, dated July 18, 1922, on Lumber Carrier, being Pl'ffs. Exhi. 1 (which see)

Def'nts. Exhi. 58—Enlargement of photograph of Def'nts. Exhi. 43.

\*Def'nts. Exhi. 59—Patent to Dingee, 414,380, Nov. 5, 1889, Elevator.

\*Def'nts. Exhi. 60—Enlargement of Drawings of said Dingee patent.

Def'nts. Exhi. 61—Model of Dingee Patent.

\*Def'nts. Exhi. 62—Nicholson Pat., 1,340,458, dated May 18, 1920—Portable Freight Stacking Elevator.

\*Def'nts. Exhi. 63—Enlargement of drawings of said Nicholson pat. [207]

\*Def'nts. Exhi. 64—French & Pavey Pat. 1,360,917, dated Nov. 30, 1920—Elevating & Conveying Apparatus.

\*Def'nts. Exhi. 65—Enlargement of drawing of said French & Pavey Patent.



\*Def'nts. Exhi. 66—Towson & Cochran Pat., 1,337,804, dated Apr. 20, 1920, on Industrial Truck.

\*Def'nts. Exhi. 67—Enlargement of drawings of said Towson & Cochran Patent.

\*Def'nts. Exhi. 68—Cochran Pat., 1,260,145, dated Mar. 19, 1918, on Industrial Truck.

\*Def'nts. Exhi. 69—Carr Pat., No. 1,407,124, dated Feb. 21, 1922 on Elevator Truck.

\*Def'nts. Exhi. 70—Enlargement of Figs. 1 and 8 of drawing of said Carr Pat.

Pl'ff's. Exhi. 71—Photograph showing arrangement of Lumber Piles in a lumber yard.

Pl'ff's. Exhi. 72—Photograph showing arrangement of Lumber Piles in the lumber yard.

Pl'ff's. Exhi. 73—Photograph showing mode in which straddle-type lumber carriers pick up stacked lumber.

\*Pl'ff's. Exhi. 74—Photograph showing operation of straddle-type carrier for picking up lumber.

Pl'ff's. Exhi. 75—Photograph illustrating use of straddle-type carrier for picking up pile of lumber arranged alongside of sorting chain.

Pl'ff's. Exhi. 76—First inside sheet of folder put out by Willamette-Hyster Company, entitled "America's Finest Straddle Truck".

\*Def'nts. Exhi. 77—Entire folder including Pl'ff's. Exhi. 76. (Twelve copies of Def'nts. Exhib. 77 to be furnished by Def'nts. and included in the printed Transcript of Record on Appeal.)

\*Def'nts. Exhi. 78—Ross Pat. 1,209,209, dated Dec. 19, 1916, Motor Truck, (being also Pl'ff's. Exhi. 1-A)

\*Def'nts. Exhi. 79—Boudinot Pat., No. 537,628, dated April 16, 1895 on Wagon.

It is further stipulated that those of the above stated designated Exhibits marked (\*) be reproduced on a convenient scale and be included in the printed Transcript of Record on Appeal in this Cause as prepared by the Clerk of said Circuit Court of Appeals.

Dated October 17, 1939.

T. J. GEISLER

Attorney for Plaintiff-  
Appellant.

REYNOLDS, FLEGEL &  
SMITH

of Attorneys for Defendants-  
Appellees.

[Endorsed]: Filed October 18, 1939. [208]

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And Afterwards, to wit, on Wednesday, the 18th day of October, 1939, the same being the 76th Judicial day of the Regular July, 1939 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [209]

[Title of District Court and Cause.]

ORDER DIRECTING CLERK TO SEND EXHIBITS TO CLERK OF APPELLATE COURT.

In accordance with the Stipulation of the parties, Plaintiff - Appellant and Defendants - Appellees, dated October 17th, 1939, and herein filed,

It Is Ordered, that the Clerk of this Court transmit to the Clerk of the Court of Appeals of the Ninth Circuit at San Francisco, California, the Exhibits designated by the parties in said Stipulation, together with a copy of said Stipulation.

Dated October 18th, 1939.

JAMES ALGER FEE

United States District Judge

OKEH:

T. J. GEISLER

Attorney for Plaintiff, Appellant.

REYNOLDS, FLEGEL & SMITH

of Attorneys for Defendants, Appellees.

[Endorsed]: Filed October 18, 1939. [210]

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And, to wit, on the 16th day of October, 1939, there was duly Filed in said Court, Transcript of Testimony to be contained in the record on appeal, in words and figures as follows, to wit: [211]

[Title of District Court and Cause.]

STATEMENT OF EVIDENCE TO BE  
CONTAINED IN THE RECORD ON APPEAL.

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A STATEMENT OF THE EVIDENCE AS  
GIVEN BY THE REPORTER'S TRAN-  
SCRIPT THEREOF, OMITTING ALL  
MATTER NOT ESSENTIAL TO THE DE-  
CISION OF THE QUESTIONS PRE-  
SENTED BY THE APPEAL.

(TESTIMONY)

This case was tried before Robert F. Maguire,  
Esq., Master in Chancery, pursuant to an Order of  
Court, beginning Monday, November 23, 1936.

Appearances:

Theodore J. Geisler, Attorney for Plaintiff;

Austin F. Flegel, Jr., and Charles M. Fryer and  
Alfred C. Aurich, Attorneys for Defendants.

Excerpts from Plaintiff's Opening Statement.

In answer to interrogatories, propounded by  
plaintiff to the defendant, the defendant was asked  
whether the device, the lumber carrier which they  
are manufacturing, embodied the elements of  
claim 4 of the patent in suit. I might mention that  
there is only one claim No. 4 in the patent in suit  
involved. In response to that the defendant, in an-  
swer to Interrogatory 4, made this reply. Interroga-  
tory 4, as I mentioned, asked the defendants to state  
definitely whether they did manufacture some device



which embodied the elements of the combination set forth by Claim 4. In response to that, reading also, in the first place, the elements, now claim 4 is composed of the following elements: "A lumber carrier comprising a frame, load-lifting means mounted therein, means for transmitting motion from a source of power to the load-lifting means comprising a clutch that can be set in neutral position or to cause the load-lifting means to move in either direction, means for manually moving the clutch to operative position, automatic means for moving the clutch to neutral position, upon a movement of the load-lifting means to a predetermined extent in either direction, and means for braking the transmitting means whenever the clutch is moved to neutral position." [212]

Now taking up those so the court may be informed as to the issue before it, in regard to element a, a lumber carrier comprising a frame, the defendant answered that their device did have a frame. With regard to element b, lumber-lifting means mounted therein, the defendant answered that it had screw lifts supported by such frame for raising and lowering any desired load, as your Honor can perceive, an equivalent device; and with regard to element c, means for transmitting motion from a source of power to the load-lifting means comprising a clutch which can be set in neutral position or to cause the load-lifting means to move in either direction, the defendant in regard to that in its answer to the interrogatory said, "a motor to supply

power for operating the screw lifts, a power controlling device to transmit and control power from the motor to such screw lifts”.

We shall contend that the power controlling device is a clutch, and a clutch will be found in the defendant's device, which they admit by their manual, Service Manual, to be manufacturing.

With regard to element d, means for manually moving the clutch to operative position, defendant states their lumber carrier includes “a handle for manually operating such power controlling device to drive the screw lifts in either of two directions or to bring the power controlling device to neutral position so that no power from the motor is transmitted to the screw lifts”.

With regard to element e, automatic means “For moving the clutch to neutral position upon a movement of the load-lifting means to a predetermined extent in either direction, the defendant said that its device had “limit stops cooperating with the screw lifts and operable automatically and independently of any load carried by the truck to bring the power controlling device to neutral whenever the screw lifts reach predetermined upper and lower limits.” [213]

So that finally we have element f in the patent in suit, “and means for braking and transmitting means whenever the clutch is moved to neutral position.” With regard to that the defendants say that their device has “an automatic spring operated brake to hold the screw lifts and connected mechan-

ism against movement whenever the power controlling device is placed in neutral.”

The Master: As I understand it, then, the new idea in this particular patent is element f?

Mr. Geisler: Element f, yes, in this combination.

The Master: You are not making any claim in this suit as to patent covering the rest of them?

Mr. Geisler: No, Your Honor.

The Master: Just the combination of these a, b, c, d, and e plus f?

Mr. Geisler: Plus f.

The Master: Which makes the patent?

Mr. Geisler: The combination in suit, yes.

The Master: All right.

## PLAINTIFF'S EVIDENCE

### CARL F. GERLINGER

was produced as a witness in behalf of the plaintiff herein and, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Geisler:

The Master: State your name and address.

The Witness: Carl F. Gerlinger; Dallas, Oregon.

The Master: You may proceed.

Q. (By Mr. Geisler) What is your business Mr. Gerlinger?

A. I am president of the Dallas Machine & Locomotive works and Klamath Machine & Locomotive works, Klamath, Oregon.



(Testimony of Carl F. Gerlinger.)

Q. The Dallas Machine & Locomotive Works is the plaintiff here in suit? That is the person suing in this case? [214]      A. Yes.

Q. When was that organized?

A. The first of December, 1919.

Q. What was your business, in other words, what experience, if any, did you have with mechanics prior to 1919?

A. I have been working in the mechanical line for forty-five years.

Q. When did you first begin that building of a lumber carrier?

The Witness: State that question again.

The Master: When did you first begin the building of a lumber carrier?      A. In May, 1921.

Q. (By Mr. Geisler) What improvement did you embody in the lumber carrier, the first one that you built? I am referring to [215] your first patent.

A. I was the first to think of and to manufacture a carrier with a positive lift and automatic feature, where automatic stop moved clutch in neutral position and applied the brake.

Q. Well, the first machine and the first patent did not include a brake?      A. No.

Q. Did you apply for a patent on your improvement that you first made in the lumber carrier?

A. On the first one?

Q. Yes.      A. Yes.

Mr. Geisler: I offer here a certified copy of patent issued to Carl F. Gerlinger July 18th, 1922, No. 1422958 for improvement in lumber carriers.



(Testimony of Carl F. Gerlinger.)

The Master: Do you want him to identify that?

Mr. Geisler: Yes.

Q. Is that your patent? A. Yes.

Q. You are the Carl F. Gerlinger mentioned in that patent? A. Yes.

Q. Do you remember going over the case, I mean the application for patent in the Patent Office, the application which matured in this patent I have just mentioned? Do you remember going over that with your attorney? A. Yes.

Q. Do you remember that in that application certain patents were cited against you, namely, Ross, No. 1209209, dated December 19th, 1916, on motor truck; also Ross No. 1271947, dated July 9th, 1918, covering portable elevator; also Overlin No. 1289529, dated December 31, 1918, on a truck; and Overlin No. 1349942, dated August 10th, 1920, covering a lumber truck? You [216] may show those four patents to the witness. And I ask you whether you remember their citation in the course of your application for patent being prosecuted—citation by the Patent Office? A. Yes, I do.

The following patents were thereupon introduced by the plaintiff: The patent to Mr. Gerlinger No. 1,422,958, dated July 18, 1922, as Plaintiff's Exhibit #1. The patent to Ross, No. 1,209,209, of December 19, 1916 as plaintiff's Exhibit #1-A. The patent to Ross of July 9, 1918, No. 1,271,947, as Plaintiff's Exhibit #1-B. The patent to Overlin, No. 1,289,529, of December 31, 1918 as Plaintiff's Exhibit #1-C.

(Testimony of Carl F. Gerlinger.)

And the patent to Overlin, No. 1,349,292 of August 10, 1920 as Plaintiff's Exhibit #1-D.

Q. (By Mr. Geisler) Now Mr. Gerlinger, in those four patents which you have here, the two Ross and two Overlin, they have a particular kind of—— A. Lifting?

Q. Lifting mechanism. A. Oh.

Q. What kind of lifting mechanism was that?

A. The Ross and the Overlin have a cable lift.

Q. Now is a cable lift—do you consider the cable lift satisfactory? A. No.

Q. Why not?

A. Their shoes are lowered by gravity and very often splinters get in between the shoe and guide and the cable would unwind and the shoe wouldn't lower, and in winter months where snow and ice it was practically impossible to operate them.

Q. Now what improvement upon that did you make, which is de- [217] scribed in your first patent?

A. Well, I was the first with a positive—first to think of and to manufacture with a positive lift with automatic feature.

Q. Do I understand when you say a positive lift that was something different than a cable?

A. A positive lift you have so much, just the same force up, then down, and the shoe will stay equal. For instance, if the carrier drops—maybe I make it a little plainer that way—if the carrier drops in a hole that can jerk itself out with the

(Testimony of Carl F. Gerlinger.)

power. Impossible to do it with a cable. In the winter time with condition like sliver, or snow or ice, have not no interference with a positive lift.

Q. State whether or not the positive lift that you referred to with your improvement consisted of rack bars and pinions operated by a motor.

A. My lift?

Q. That is in your first patent.

A. Yes, was of a rack bar and pinion through a worm gear and clutch.

Q. Now what else did you incorporate in your first improvement and put in that first patent with regard to a control of the load-lifting and lowering devices?

A. Automatic stops that control when the limit of travel is reached.

Q. Either up or down?           A. Down.

Q. How about limit of travel up?

A. I had no up stop on the first machine. I had an up stop with a load binding, when you have to load by raising a load.

Q. Well, wasn't that—I know what he means—wasn't that the same thing?

A. The same thing, yes.

Mr. Fryer: We object to leading the witness, your Honor. [218]

The Witness: That is the same thing.

Mr. Fryer: On a point of this sort.

The Master: Sustained.

Mr. Geisler: If your Honor please, he has it here. The witness doesn't understand.

(Testimony of Carl F. Gerlinger.)

Q. I call your attention to part 67 on your first patent; I think it is 67. State whether or not you haven't some means—now I am entitled to that question—for stopping the raising of that load, controlling the raising of that load. A. Yes.

Mr. Fryer: We object to that as cross examination of his own witness, your Honor.

The Master: Overruled. Where in the patent is any 67?

Mr. Geisler: I think that is—I am mistaken as to that, your Honor. That is in Patent No. '025; it is designated w 6 in Patent No. '958.

The Witness: That is correct. That is the upper stop.

The Master: Wait a minute.

Q. (By Mr. Geisler) In Patent 1422958 explain what that part there w 6 is.

A. That is the stop with the upper movement with a load.

Q. I see. Now when did you first build a lumber carrier such as shown in your patent, Plaintiff's Exhibit 1? That is '958. A. In May, 1921.

Q. When was that carrier completed?

A. End of July, 1921.

Q. Did you operate that carrier? A. Yes.

Q. Where?

A. It was tested in the Willamette Valley Lumber Company's yard.

Q. What did you discover in that test?



(Testimony of Carl F. Gerlinger.)

A. I discovered that I needed a brake on the lifting device.

Q. Why? [219]

A. To stop the lifting device from further movement.

The Master: From what kind of movement?

Q. (By Mr. Geisler) What do you mean by further movement?

A. To stop from further movement.

Q. What direction? A. In either direction.

Q. Well, did you notice any particular difficulty?

A. When?

Q. Wait a minute. Did you notice any particular difficulty with regard to the lowering of the load as you operated the carrier?

A. Well, you had to—by lowering—I didn't get that question right, Mr. Geisler.

(Last question read.)

A. Well, it gradually released the load.

Q. What do you mean by released the load?

A. Well, the load would settle.

Q. Was the settling of the load quite perceptible?

A. Yes, it was. I mean, but the main reason, too, for the brake is for to stop the lifting device from further movement, see.

Q. Supposing you ran that carrier across the yard, the lumber yard, state whether or not you noticed any settling of the load as you traveled.

A. Oh, yes, through the vibration. Without the brake it isn't possible to operate with a positive lift.

(Testimony of Carl F. Gerlinger.)

Q. Now after you had noticed that difficulty what further did you do with the lumber carrier?

The Witness: I didn't get that.

(Last question read.)

Mr. Geisler: I mean the one that you had in the——

A. Well, I moved it back to the shop. [220]

Q. Where was this trial made? I forgot to ask you. Where did you try out that lumber carrier the way you built it first; in what particular lumber yard was that?

A. In the Willamette Valley Lumber Company.

Q. Where is that?      A. At Dallas.

Q. Now what did you do with that lumber carrier after you found that it didn't work as you wanted it to?

A. Well, I rebuilt—I moved it back. The power plant wasn't satisfactory, and gear drive not satisfactory, and improvement was needed in the lifting device. Is that what you are asking?

Q. Well now, what did you do with improving the lifting and lowering devices?

A. With this machine I didn't do anything. I rebuilt this machine.

Q. Well, when you rebuilt it what changes did you make in it?

A. I changed the power plant and made improvement in the lifting device.

Q. What was the improvement in the lifting device?      A. I applied the brake.

(Testimony of Carl F. Gerlinger.)

Q. When did you make that improvement—state the time approximately—including the brake mechanism?      A. September, 1921.

Q. When you had that machine rebuilt, including the brake mechanism, did you make any further test with it?      A. Yes.

Q. Where?

A. At the Willamette Valley Lumber Company's yard.

Q. When was that test made?

A. End of September, 1921.

Q. Was that machine,—was that lumber carrier, including the brake mechanism, operated practically after that?      A. Yes. [221]

Q. By whom?

A. By the Willamette Valley Lumber Company.

Q. Did you people have a patent on your improved lumber carrier, including the brake mechanism?      A. Yes.

Mr. Geisler: I now offer in evidence Patent No. 1457025, dated May 29, 1923, issued to Carl F. Gerlinger, covering lumber carriers. That is the patent here in suit. Is this the patent which you received?

A. Yes.

Mr. Geisler: I believe we will offer in evidence the interrogatories and answers to interrogatories filed by the defendant in this case, as I wish to rely upon them. Shall I make a formal offer of that at this time?

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: If Your Honor please, I do not understand whether the last offer has been completed or not. I thought there was an offer being made, and I would like to get the number of it, if it has been received. I have no objection to that offer.

Mr. Geisler: Well, it just occurred to me, Mr. Fryer.

The Master: What about this patent that has been identified? Are you offering that?

Mr. Geisler: Yes, Your Honor.

The Master: All right, that will become Complainant's Exhibit 2 and it is received.

(Patent Number 1457025 referred to was thereupon received in evidence and marked Complainant's Exhibit 2.)

Mr. Geisler: Now, Your Honor, I renew my offer with regard to the answers to the interrogatories, so that they may be formally before the Court.

The Master: Is there any objection?

Mr. Fryer: No objection, Your Honor. [222]

The Master: I shall mark them as an exhibit.

The Master: Now, the answers which you are offering in evidence are the answers to the interrogatories filed on July 15, 1936?

Mr. Geisler: Yes. I presume, in order to make the record complete, we will probably have to have the interrogatories and the answers, too, otherwise they may not be—so I will offer the interrogatories and the defendant's answers. There are two. I will make copies of both.



(Testimony of Carl F. Gerlinger.)

Mr. Fryer: I have no objection.

(The interrogatories and answers referred to were thereupon received in evidence and marked Complainant's Exhibits 3 and 3-A.)

Mr. Geisler: I offer in evidence the file wrapper and contents of the patent to Carl F. Gerlinger No. 1422958, dated July 18, 1922.

(Said file wrapper and contents covering patent No. 1422958 were thereupon received in evidence and marked Complainant's Exhibit 4.)

Mr. Geisler: I also offer in evidence the file wrapper in relation to patent to Carl F. Gerlinger No. 1457025, dated May 29, 1923.

(The file wrapper referred to covering patent No. 1457025 was thereupon received in evidence and marked Complainant's Exhibit 5.) [223]

Q. (By Mr. Geisler) Now, going back to the lumber carrier which you delivered to the Willamette Valley Lumber Company on October 1st, 1921, did you make or build any more lumber carriers of that same type later?

A. Yes, I started—we started to work in the first part of October in 1921 and finished two February 1st, 1922.

Q. State what if any changes you made in the lumber carriers which you built like your patent there, number——

A. I don't have that patent here.

Q. —'025. Will you give him a copy there?

(Testimony of Carl F. Gerlinger.)

The Master: '025?

Mr. Geisler: '025, yes.

The Master: The witness is given Exhibit Number 2.

A. The only change I made was mechanical only. It was improvement in the lifting device and change the control lever.

Q. The second machine had those improvements?

A. Yes.

Q. Is that right? A. Yes.

Q. Did you build any more machines like '025? I mean that patent, number 2? A. Yes.

Q. How many more shortly after this time of 1921 and 1922, how many more did you build at that time? You built one machine——

A. From when?

Q. Just around that time? You built one machine with an improvement. A. Yes.

Q. How many more did you build of that same, just around that time?

A. We built one hundred and five.

Q. Yes, but you built it—the machine which you built in 1922, was that similar to—that was the 3 machine, is that right? [224]

A. At '22, as I stated before, we finished two in February, and then we kept on building the machine the same.

Q. Now, I would like to get those machines in my mind and before the Court in order numerically. Now, the first machine, as I understand, you de-

(Testimony of Carl F. Gerlinger.)

livered to the Willamette Valley Lumber Company  
October 1st, 1921?      A. That is correct.

Q. Then you built, shortly after that, another  
machine just like your patent here in suit but with  
certain improvements?

A. With certain improvements, yes.

Q. Which you stated were mechanical changes?

A. Yes.

Q. Now, what became of that number 2 machine?

A. The number 2 machine and 3 machine was  
delivered to the Cobb-Mitchell people at Valsetz,  
what our record will prove.

Q. Valsetz?      A. Yes.

Q. Oregon?      A. Oregon.

Q. And did you build a number 4 machine?

A. Yes.

Q. What became of that? When did you build it,  
too?

A. Well, our Secretary can explain that better.  
He got all the records.

Q. Well, do you know approximately?

The Master: Have you a list of those machines?

Mr. Geisler: Well, the only way we can identify  
them, Your Honor, would be——

The Master: No, I am not speaking about that. I  
say, have you a list of them?

Mr. Geisler: Yes, we will be able to show you—  
you mean in regard to time made?

The Master: The numbers and places made and  
places dis- [225] posed of and the date.

(Testimony of Carl F. Gerlinger.)

Mr. Geisler: I will have that.

The Master: I thought you had that here.

Mr. Geisler: I haven't that here, but I thought I would bring it out by the witness.

The Master: Very well.

Q. (By Mr. Geisler) Can you tell approximately, that number 4 machine?

A. To who it was sold to?

Q. Yes, when and to whom?

A. Or when it was completed?

Q. No, I would like to know to whom it was—well, when was it completed and to whom was it sold, if you can remember?

A. Well, our shop—

Q. Do you have a notation of that in your shop records?

A. Yes.

Mr. Geisler: Well, then we will pass the question until—We have the Secretary here, Your Honor.

The Master: If it is any convenience, Mr. Geisler, you can withdraw this witness and put your Secretary on and get those in and then you can proceed with your examination.

Mr. Geisler: I think I am almost finished with this witness.

The Master: Very well.

(A drawing was then placed on an easel.)

Q. (By Mr. Geisler) I would like you to look at that drawing and state what it represents?

A. That is the lifting device.

Q. Of your lumber carrier?

A. Of our first lumber carrier.



(Testimony of Carl F. Gerlinger.)

The Master: That is the present one, or the first patent?      A. No.

Mr. Geisler: Of the patent in suit. [226]

A. Patent in suit.

The Master: Very well.

Q. (By Mr. Geisler) Does this show the drawing just the same as in the patent in suit?

A. No.

Q. What is this a drawing of?

A. That is a drawing—the drawing is made the same as the second and third and fourth machines.

Q. Who made that drawing?

A. Mr. Dimick, H. N. Dimick.

Q. He is here in court?      A. Yes.

Q. As I understand, that represents the construction as made in the first, second and third machines, is that correct?      A. Yes.

Mr. Geisler: I will have the power identified by another witness.

Q. (By Mr. Geisler) Do you know from what particular machine, the second, third or fourth—I mean lumber carrier—that particular drawing was made?

Mr. Fryer: We object to that, if Your Honor please, on the ground, first, that there is no foundation laid, and, secondly, that it is leading.

A. That is from the fourth one——

Mr. Geisler: Just a minute.

The Master: The witness has already testified that it is the second, third and fourth machines, so I don't think it becomes leading.

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: He has not testified anything about who made the drawing, though, who made it and how it happens to be here.

Mr. Geisler: He stated he made it in his office, in his shop. We will call the maker later on as a witness.

The Master: Well, I think he may ask what it is supposed to represent, and then if he connects it up by the proper testi- [227] mony of the men who drew it,—

Mr. Geisler: Very well.

The Master: —or if the witness knows of his own knowledge that it is an accurate portrayal of the machine.

Mr. Geisler: I will perfect my question. Do you know of your own knowledge, Mr. Gerlinger, that this drawing is an accurate drawing of the lifting mechanism and controls the same as your second, third and fourth machines?

A. Yes, I do.

Q. How do you know it?

A. I am positive of that.

Q. Well, state the facts, how you fix that fact in your mind?

A. Well, we had one set up in our plant.

Q. You had a mechanism set up in your plant?

A. Yes.

Q. What kind of a mechanism was that?

A. The same as shown here on this drawing.

Mr. Geisler: May I offer this in evidence, so that we can refer definitely to it.

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: We object to the offer, if your Honor please, on the ground that no proper foundation has been laid.

The Master: The objection will be sustained. Number 6 for identification.

(The drawing referred to was thereupon marked for identification Complainant's Exhibit 6.)

Q. (By Mr. Geisler): You spoke of a lifting mechanism and control for the same, of which this drawing was made. Where was that mechanism set up?

A. In our plant in Dallas.

Q. How did you get that mechanism?

A. Our general superintendent got it from the Lumber Company and brought it in the shop and set it up, from—actually from a carrier. [228]

Q. This mechanism was set up in your shop?

A. And from which this sketch was made.

Q. State whether or not you can positively identify that as being the lumber raising and lowering mechanism and control therefor as built in your carriers number 2, 3 and 4?

A. Absolutely.

Mr. Geisler: I renew the offer of the exhibit.

Mr. Fryer: Same objection, your Honor.

The Master: Mr. Gerlinger, have you ever checked that drawing over with the mechanism as it was actually set up in your shop?

A. Yes, I have.

The Master: Do you know it to be accurate?

A. Yes.

(Testimony of Carl F. Gerlinger.)

The Master: Does it correctly show the relation of each part to the other? A. Yes, your Honor.

The Master: It may be received.

(The drawing heretofore marked for identification Complainant's Exhibit 6 was thereupon received in evidence.)

The Master: You may proceed.

Q. (By Mr. Geisler): Now, it is stated here in the answer in this case that you knew of the building by defendants of a similar carrier six years prior to the filing of this suit. You may state whether or not that is a fact?

A. Ask me that again, please.

Mr. Geisler: Will you read it, please?

(The question was thereupon read.)

A. I know that they was building carriers, but I didn't know that they had them features on a carrier.

Q. What features are you referring to?

A. Them automatic features which is covered by my claim of 4. [229]

Q. The same as number 4?

Mr. Fryer: We object to that as leading the witness, if your Honor please. Counsel is putting words in the mouth of the witness.

The Master: Oh, I think it is objectionable as leading.

Q. (By Mr. Geisler): When did you first find that the defendants were manufacturing a carrier which embodied the claim for patent in suit?



(Testimony of Carl F. Gerlinger.)

A. September——

The Master: You speak of the defendants. Do you mean both defendants, or the defendant Willamette-Hyster Company?

Mr. Geisler: I will take the defendant Hyster Company. A. September, 1935.

Q. (By Mr. Geisler): What were the circumstances under which you made that discovery?

A. I sold two machines to Shevlin-Hixon.

Q. Where?

A. At Bend, Oregon, and after we received the requisition, a few days later we received a letter to ask us for a guarantee for infringement of patents—patent or unpatent.

The Master: For a patent or what?

A. Patent or unpatent.

Q. (By Mr. Geisler): You mean things patented or not patented, is that right?

A. Yes, patented or not patented.

Q. State whether or not that is the order you received from——

A. That is the order what we received from them.

Mr. Geisler: I offer that first. State whether or not this is the letter that you received from the Shevlin-Hixon Company with regard to those two carriers? A. That is the letter.

Mr. Geisler: I offer them in evidence.

The Master: Any objection? [230]

Mr. Fryer: We object to it on the ground, Your Honor, that it is wholly unrelated to any issue in

(Testimony of Carl F. Gerlinger.)

the suit and not competent to prove any of the issues, not connected up in any way.

Mr. Geisler: Very well, I purpose to connect them in a moment. Now, had you done business with the Shevlin-Hixon Company before?

A. Yes, we done—we sold them, many years ago, quite a few carriers and done quite a few thousand dollars' worth of business with them and we never been asked this.

Q. Well, in your transactions with the Shevlin-Hixon Company had they ever before this time asked you for a guarantee against patents?

A. No.

The Master: With regard to the offer, both offers will be rejected at this time, because the documents seem to have no relevancy to the issues in this case. If they shall hereafter be connected up, why, the question can be resubmitted.

Mr. Fryer: Pardon me, have they an identification number, Your Honor?

The Master: The order is 7 for identification; the letter is 8 for identification.

Mr. Fryer: Thank you.

(The order and letter referred to were thereupon marked for identification, respectively, Complainant's Exhibit 7 and Complainant's Exhibit 8.)

(Testimony of Carl F. Gerlinger.)

Q. (By Mr. Geisler) After you had received that letter from the Shevlin-Hixon Company demanding a guarantee against infringement upon patents what did you do?

A. I had our general superintendent investigate, and also sent for some patents of the Willamette-Hyster's.

Q. Had you—— [231]

Q. (By Mr. Geisler) About the time that you received this letter, as you stated, from Shevlin-Hixon did any rumor come to your ears that the Willamette-Hyster Company was threatening to sue you for an infringement?

Mr. Fryer: We object to that, if Your Honor please, on the ground that no foundation has been laid, that any rumor of that sort would be not material or relevant to any issues here, and that, furthermore, it would be hearsay.

The Master: Except upon the ground as to when he first learned or had reason to believe that the defendant Hyster Company was engaged in manufacturing a machine which included some of the elements of his patent.

Mr. Fryer: True, Your Honor, but the question calls for a rumor that the Willamette-Hyster Company was going to sue Mr. Gerlinger's company, which is——

The Master: Yes, I appreciate that, Mr. Fryer. The objection will be overruled.

(Testimony of Carl F. Gerlinger.)

Q. (By Mr. Geisler) What did you do—or did you answer that question? I beg your pardon.

A. No, I didn't answer it yet.

Q. Well, please answer. The stenographer will kindly repeat the question, and you answer it.

A. What was the question?

(The question was thereupon read.)

A. Our Sales Manager came back——

Q. Just answer that “yes” or “no”, whether you heard the rumor or not. Never mind the details.

A. Yes, I heard that rumor.

Q. What did you do then?

A. Well, I sent our General Superintendent, Mr. Waters, out to investigate. I couldn't understand it.

Q. Investigate what?

A. What they wanted to sue us on—and I got a copy of their patent, and after I—— [232]

Q. Copy of whose patent?

A. Of the defendant's patent, Willamette-Hyster's—and after looking over them patents and over the machine I found out they are using our features, our automatic features on our machine. That is the first time I knowed anything about it.

Q. State whether or not you knew that the machine which you examined at that time was the lumber carrier manufactured by the defendant Willamette-Hyster Company?

A. What was that question, please?



(Testimony of Carl F. Gerlinger.)

(The question was thereupon read.)

A. Yes.

Q. Then after you found that in your opinion there was an infringement by the Willamette Lumber Company—or the Willamette-Hyster Company, what did you do?

A. I took the matter up with you.

Q. When did you make this discovery that the defendant Willamette-Hyster Company was infringing upon your patent, approximately?

A. End of September.

Q. Of what year?           A. 1935.

Q. And on what patent did you consider they were infringing?           A. On patent 1457025.

Mr. Geisler: Now I renew the offer of those, just as a means of connecting the time and the occasion when Mr. Gerlinger here, or the plaintiff, I should say, ascertained that there was infringement by the defendant upon the patent in suit.

Mr. Fryer: We make the same objection, if your Honor please.

The Master: They may be received, merely for the purpose of fixing the date, or approximate date.

(The papers heretofore marked for identification Complainant's Exhibit 7 and Complainant's Exhibit 8 were thereupon received in evidence.) [233]

Q. (By Mr. Geisler) I show you here three drawings and ask you whether you can identify

(Testimony of Carl F. Gerlinger.)

them as having been made by the plaintiff for the purpose of applying for a patent, applying for your patent number 1457025?

A. Yes, they are the same as the patent drawing.

Q. Do you remember about when they were made?

Mr. Fryer: That is objected to, if Your Honor please, on the ground that no proper foundation has been laid, nothing has been shown to indicate that this witness has the means or knowledge to fix the date of the making of these drawings, which so far the record shows were made by the corporation.

Mr. Geisler: Well, a corporation couldn't very well make any drawings.

The Master: He may inquire of the witness how he knows those were made and when they were made.

A. Those drawings was made in December, 1921.

Q. (By Mr. Geisler) Do you know by whom they were made?

A. Yes, by—I don't remember his initials, but his name was Benton; but our shop records should show his initials, if you like to know.

Q. Under whose direction were those made?

A. What was that?

Q. Under whose direction? Did you direct those drawings to be made?

A. Under my direction, yes.

Q. For what purpose? Why did you have those made?

(Testimony of Carl F. Gerlinger.)

A. For the improvement in—or for the patent drawing.

Mr. Geisler: I will offer those three sheets in evidence. They are identical with the patent as shown, the drawing that is shown with the patent.

Mr. Fryer: We object to them on the ground that they have not been properly authenticated nor proper foundation has not been laid.

The Master: The witness testified they were made by the [234] draftsman under his direction and in the employment of the plaintiff concern. They may be received, and they will be—Mr. Geisler, will you examine these? Is this one which I am now handling the lift mechanism?

Mr. Geisler: Yes, it is the same, if Your Honor please, as shown——

The Master: Yes, but is that the lift mechanism?

Mr. Geisler: The lift mechanism, yes, sir.

The Master: All right, that will become number 9.

(The drawing referred to was thereupon received in evidence and marked Complainant's Exhibit 9.)

The Master: And this next drawing, which is number 10, is what?

Mr. Geisler: I didn't get Your Honor's question.

The Master: And this next drawing, what is that?

(Testimony of Carl F. Gerlinger.)

Mr. Geisler: Oh, this is also the original draft of the patent drawing on the patent in suit.

The Master: Yes, I know it, but that is what view of the machine?

Mr. Geisler: Oh, that is the same as shown by——

The Master: What view is it?

Mr. Geisler: Wait; I will give you the exact figure. It is the same as Figure 2 on sheet 2 of the patent drawing.

(The drawing referred to was thereupon received in evidence and marked Complainant's Exhibit 10.)

The Master: And the other one——

Mr. Geisler: Will you kindly show it so that I may identify it? That is a side elevation, shown by Figure 1 of the patent drawing, on sheet 1, of the patent in suit.

The Master: All right.

(The drawing referred to was thereupon received in evidence and marked Complainant's Exhibit 11.)

The Master: You may proceed. [235]

Q. (By Mr. Geisler): Please look at that paper and state whether that is your signature?

A. Yes, that is.

Mr. Geisler: I offer this as an assignment of the patent in suit and various other patents to the plaintiff in the case.



(Testimony of Carl F. Gerlinger.)

Mr. Fryer: No objection.

The Master: It becomes 12.

(The assignment referred to was thereupon received in evidence and marked Complainant's Exhibit 12.)

Mr. Geisler: You may take the witness.

### Cross Examination

By Mr. Fryer:

Q. State whether or not the reference characters applied to the chart, Exhibit Number 6, are the same as are applied to the corresponding parts of your machine in your patent in suit?

A. Which do you refer to, Mr. Fryer?

Q. Do you know that your patent in suit is here marked Plaintiff's Exhibit 2? I ask that the witness be handed the patent in suit, Exhibit Number 2, please.

The Master: I think he has them both there.

Q. (By Mr. Fryer): I now call your attention to the large chart on the easel and ask you whether you understand that that is Exhibit Number 6?

A. Exhibit Number 6—I can't get it yet, Mr. Fryer.

Q. That is that large chart right behind you, Mr. Gerlinger.

A. Oh.

Q. Do you see Exhibit 6 marked on there? All right, now, with the understanding that the patent you have in your hand is Exhibit Number 2 and that the chart is Exhibit Number 6, will you state whether the numbers of the various parts on the

(Testimony of Carl F. Gerlinger.)

drawings of your patent, Exhibit Number 2, correspond with the drawings on the chart, Exhibit Number 6?

The Master: You mean the numbers? [236]

Mr. Fryer: The numbers on the chart.

A. Oh. Oh. They do. They do.

Q. Will you point out on the chart, Exhibit Number 6, the cam 69 of your patented construction shown in Exhibit 2?

A. 69? That don't show, number 69 on here.

Q. When you say "here" what do you mean?

The Master: On 6.

A. Oh, 6—you are referring to 6? I am referring on sheet 2 here.

The Master: I say, you don't find number 69 on this Exhibit 6?

A. No.

Q. (By Mr. Fryer) In your patent you state that a member 67 has an arm with a cam-shaped upper end 69. Can you find that arm with the cam-shaped upper end 69 in the mechanism shown on the chart, Exhibit 6?

Mr. Fryer: The portion of the specification which I refer to is page 2, lines 27, 28, 29, 30, and 31, and number 69 which I refer to is shown in Figure 2 on sheet 2 of the drawings, in plan 2. May I have the question read, may it please your Honor.

(The question referred to was thereupon read.)

A. Here is 67, and instead of having a cam there is a plate and set screws, which is only a mechanical change. There is no change from principle.

(Testimony of Carl F. Gerlinger.)

Q. (By Mr. Fryer) The part 67 on the drawing number 6, then, corresponds in every way in construction and operation with the part 67 and the part 69 in the drawings of your patent, Exhibit 2, is that right?

A. Except mechanical changes.

Q. Well, name the first of those mechanical changes you refer to. [237]

A. Well, this shows mechanical changes, as I stated before, with this plate and with those set screws instead of the cam as shown here (indicating).

Q. When you refer to "This plate" and "this set screw" in your answer you refer to the rectangular yellow member on Exhibit 6 extending beneath the horizontal arm of the red mechanism?

A. Yes.

Q. And that yellow extension on the part 67, then, in your opinion, corresponds to the cam 69 in your patent, is that right?

A. What was that question again?

(The question was thereupon read.)

A. Only a mechanical change there.

Mr. Fryer: I move to strike the answer as not responsive, if your Honor please, and ask to have the question read to the witness.

The Master: Read the question to the witness. The answer will be stricken. Just answer the question, Mr. Gerlinger.

(The question was thereupon read.)

(Testimony of Carl F. Gerlinger.)

A. Yes.

Q. (By Mr. Fryer) In the operation of the mechanism shown on Exhibit 6 the yellow member 67 functions to throw the clutch mechanism into neutral when the load in the machine rises to such a position that it strikes the part 67 and moves it up, is that right? A. That is right.

Q. Now, do I correctly understand your testimony to the effect that you built a machine having a part in it like 67 which moved upwardly to throw the clutch into neutral when the load struck the part 67?

A. The machines afterwards, you mean?

Mr. Fryer: Read the question, please.

(The question was thereupon read.)

A. We built them all, number 1 and number 2 and number 3 and [238] number 4, all the machines, the same as the drawing shows there, with the upper stop.

Q. And the member 67, and which is moved by the load in the machine, is a part which you call your limit stop? A. With the load.

Q. That is, you have an upper limit stop in the operation of the mechanism on Exhibit 6 when you have a load in it which will strike 67 and move it up—— A. Yes.

Q. ——to throw the mechanism into neutral?

A. The neutral position and set a brake, yes.

Mr. Fryer: I didn't hear that answer.

(The answer was thereupon read.)



(Testimony of Carl F. Gerlinger.)

A. Apply the brake.

Q. Your first machines, which you have called here 1, 2, 3 and 4, all had that mechanism?

A. The first machine—all had this on—I mean all had this on.

The Master: Referring to 67?

A. Referring to 67.

Q. (By Mr. Fryer) What other machines, if any, besides your machines 1, 2, 3 and 4 were made by you which had a part 67 which was moved upwardly by the load to throw the clutch into neutral?

A. What is that question again? I didn't get that.

(The question was thereupon read.)

A. All the rest of the machines of this model.

Q. How many more of this model did you make?

A. Six more.

Mr. Fryer: We have consented that Mr. Geisler might ask the witness some further questions on direct, your Honor.

The Master: All right, Mr. Geisler.

#### Further Direct Examination

By Mr. Geisler:

Q. You stated this morning, Mr. Gerlinger, that the patent drawings for '025, that is to say, the Plaintiff's Exhibit No. 5, was [239] made by a Mr. Benton; is that correct?

A. That was Mr. Wetteland.

Q. W-e-t-t-l-a-n-d? A. W-e-t-t-e-l-a-n-d.

Q. Where is Mr. Wetteland?

(Testimony of Carl F. Gerlinger.)

A. I tried to locate him but he used to work here in Portland for the Portland Brazing & Machine Works, but he left for the East.

Q. And you don't know where he is?

A. No.

Q. Through whom did you make application for patent on this Exhibit 5; that is your Patent 1457025, the patent in suit. Through whom did you make application for that patent?

A. Baldwin & Wright.

Q. Baldwin & Wright? A. Yes.

Q. You stated this morning that after October 1st, 1921, I believe in December of 1921, you made some changes in the hoist lifting and controlling mechanism. A. Yes.

Q. Those changes I understand are shown by this Exhibit 6? A. Yes.

Q. Please explain why the changes as shown in Exhibit 6 were not incorporated in your patent drawings as filed for the patent in suit.

A. The patent drawings were sent in before I made the changes in the second machine.

The Master: Mr. Geisler, if you are talking about changes I would like to have you ask the witness to state what changes in mechanical construction were made, so we will know what we are talking about.

Mr. Geisler: Would you kindly tell the Master.

The Witness: The only changes that was made, your Honor, is in the control levers. [240]

Q. You had better point to it by number and color, if you wish, so the Court can see it.

(Testimony of Carl F. Gerlinger.)

A. This lever 64 used to go—this lever used to be straight through, but it connects with the same lever, showing the mechanical change, and this little bell crank——

Q. You will have to give the bell crank a number.

A. This bell crank 66 was turned over to take care of the duplication of the lower stop with the upper stop, and that——

The Witness: And the duplications were changed from the patent drawing: this lower stop was duplication for the upper stop; I mean this upper stop and this lower stop.

Q. What are the numbers of the stops that you just have referred to?

A. Well, No. 91 is the upper stop and——

Q. 91?

A. 91 and 90. This when you raise up with the empty shoes, up to the end of the travel.

Q. You pointed to 91 as limiting the upper lift. Look at that again and see whether you are right.

A. This is for the up stop.

The Master: When you say “this” what do you refer to? A. This lower, 91.

The Master: What is the number of it?

A. 91, your Honor.

The Master: That controls the upward movement?

A. Upper movement empty.

The Master: All right.

A. And this controls——

(Testimony of Carl F. Gerlinger.)

The Master: What number?

A. 65 controls the downward movement. As you can see, it is just a duplication from the top to the bottom. [241]

Mr. Geisler: I have a miniature here, your Honor. I gave Mr. Fryer one, too. I happen to have this same thing in three different positions. It may be convenient for the Court to have it before him.

The Master: I should like to have it. It is not offered as an exhibit but merely as illustrative of the testimony, as I understand.

Mr. Geisler: Yes, your Honor.

The Master: Very well.

Mr. Geisler: It is just a picture of that layout—I mean a photograph.

The Master: May I make an inquiry here so I will understand?

Mr. Geisler: Certainly.

The Master: Or attempt to understand this as it goes along. Relating what is shown in the drawing with what is shown in this model, which is not as yet in evidence but which counsel used in his opening statement, referring to the——

The Witness: To this (indicating)?

The Master: No; I am referring to the red portion immediately to the right of the end of the lever. Where is that indicated upon the model?

A. It is right here.

The Master: That refers then to the crossbar, descending crossbar, at the end of the lever?



(Testimony of Carl F. Gerlinger.)

A. Yes.

The Master: Now it appears to turn toward the drum or flywheel of the machine. How is that indicated?

A. Here (witness illustrating with model).

The Master: Perhaps I have not made my inquiry clear. I am referring now to this portion of the bar. Does that continue on, or does that stop, as shown here in the drawing?

A. No. That stopped there. That is over here (indicating). [242]

The Master: That is what I am trying to get in mind.

A. That is shown here (witness indicating on model). This is the bracket right over here. It is just cut off there.

The Master: It is merely a fastening bracket?

A. Yes.

The Master: That is all I wanted to ask. I think I get it now.

Mr. Geisler: I at this time offer that model in evidence as illustrating the operation. It is not accurate, but it is illustrating the construction and operation of the claim in suit.

Mr. Fryer: We object to it, if your Honor please, upon the ground, first of all, that no foundation has been laid, and on the further ground that it is not in accordance with the drawings of the patent in suit and for that reason is misrepresentative. I think until a proper foundation is made to show

(Testimony of Carl F. Gerlinger.)

that it truly and correctly represents the machine in patent it should be excluded from the record.

The Master: On the ground that the proper foundation has not as yet been made I shall sustain the objection. I am not yet advised as to the propriety of the other objection. But it will be marked 13 for identification.

(The model was thereupon marked for identification Complainant's Exhibit 13.)

Mr. Geisler: I think that is all.

Mr. Fryer: Now if the Court please, before we proceed with our cross examination we ask that an order be entered excluding all witnesses from the court room except the witnesses representative of the parties themselves. In that connection Mr. Grab, of the Willamette-Hyster Company is the only party here on behalf of the defendants who will be a witness, and he is representative of that corporation.

Mr. Geisler: Well, all the witnesses I have here, Your Honor, [243] are Mr. Waters, who has just stepped out, and Mr. Ballantyne, and Mr. Ballantyne is a representative of the defendant corporation.

Mr. Fryer: Do I understand they are all officers or executives of the plaintiff corporation, Mr. Geisler?

Mr. Geisler: They are employed there.

Mr. Fryer: I think the exception only goes, if your Honor please, to one witness on each side who

(Testimony of Carl F. Gerlinger.)

is to represent the corporate entity, and that all other witnesses, even though employed by a corporate party, are usually included in an order excluding witnesses.

Mr. Geisler: Well, we have the secretary and treasurer here of the plaintiff corporation; we also have the general superintendent here.

Mr. Fryer: We have no objection to one representative to represent the corporate entity, but we do object to a number of them, your Honor, if they are going to be witnesses.

Mr. Flegel: I will say to the Master that none of the defendants' witnesses have been in the court room at any time during the proceedings, except Mr. Grab.

The Master: What position do you take with regard to the motion, Mr. Geisler?

Mr. Geisler: Well, I don't know. I suppose it is addressed somewhat to the discretion of the Court. If the defendant insists upon it I will have to leave it up to the determination of the Court.

The Master: Well, I know, but I want to be advised as to what your position is on the matter.

Mr. Geisler: Well, if it is ordered I will have to—if your Honor means I shall have to go back there and bring in these different witnesses one at a time I can do that.

The Master: No. I mean, do you object to the motion; and, if so, what is the ground of your objec-

(Testimony of Carl F. Gerlinger.)

tion and what modifications are agreeable to you?

[244]

Mr. Geisler: The party, Mr. Grab, who is retained here in the capacity of an officer of the corporation, —I would like to ask, in the first place, what is his official position?

Mr. Fryer: Mr. Grab is the sole individual employed by the defendant Willamette-Hyster Company, who is in charge of the carrier business of that concern. He is in direct charge of the manufacture and sale of the subject matter which is here accused of being an infringement of the patent in suit, and he, I think, is the only man in that organization having that detailed knowledge of that branch of the business.

Mr. Geisler: Mr. Grab is also the one that brought knowledge of this carrier which the defendant is now making, and the carrier from the plaintiff's shop.

The Master: I didn't get that statement, Mr. Geisler.

Mr. Geisler: Mr. Grab is also the party formerly working for the plaintiff who carried the device here in controversy from plaintiff's shop into defendant's shop and caused it to be made there; so I think he is a very interested party.

Mr. Fryer: We submit that is no reason for denying the defendants' motion, Your Honor.

The Master: Is he an officer of the defendant corporation?



(Testimony of Carl F. Gerlinger.)

Mr. Fryer: He is a managing director, but he is not a corporate officer. He is the sole man in the defendant's organization, however, who manages that branch of the business. It is a division of the Willamette-Hyster Company and Mr. Grab is in charge of that division of the corporation's business.

The Master: Of course, I shall permit the patentee to be present. I shall permit such person of the technical manufacturing force of the plaintiff to be present and one of its representatives who is such as secretary or president, as you may select. The other witnesses I will order excluded.

Mr. Geisler: Well, your Honor, the patentee is the president. [245]

The Master: You may select one other officer then of the corporation.

Mr. Geisler: I will select Mr. Ballantyne, who is its secretary. Your Honor, we have two men here; one is the superintendent of construction, Mr. Waters; he is not now present; and Mr. Dimick, who has charge of constructive work in the shop.

The Master: Which one do you wish to select?

Mr. Geisler: Well, they are both material to us. Just a minute; I will ask who is the most important. I will select Mr. Dimick then. He is the draftsman and in charge of construction there under Mr. Waters.

The Master: Very well. The Bailiff will make arrangement for the accommodation of all other

(Testimony of Carl F. Gerlinger.)

witnesses in the witness room, and all others except the patentee—and is it Mr. Waters?

Mr. Geisler: Mr. Dimick.

The Master: Mr. Dimick, and who is the other officer, Mr. Valentine? Is it Valentine or Ballantyne?

Mr. Geisler: Ballantyne.

The Master: Mr. Ballantyne may be present, and counsel may understand that whenever they desire to call or are ready to call their witnesses if they will inform the bailiff he will take the message to them.

Mr. Geisler: Thank you. Proceed, Mr. Fryer.

### Cross Examination

By Mr. Fryer (Resumed):

Q. Is the part marked 91 on the chart Exhibit 6 shown in the drawings of your patent here in suit?      A. No.

Q. Is there a part on the model, Exhibit 13 for identification, marked 91 and corresponding to 91 on on the chart, Exhibit 6?

The Master: Exhibit 13 is the model.

A. The model is shown the same as the drawing.

Mr. Fryer: May I have the question read again please. [246]

(Last question read.)

Q. (By Mr. Fryer) Can't you answer that question?      A. I don't know what you mean.

Q. Can you find on the model, Exhibit 13, a part corresponding to the part 91 on the chart, Exhibit 6?

(Testimony of Carl F. Gerlinger.)

A. Part 91 (indicating on Exhibit 6) is right down here (indicating on Exhibit 13 for identification).

Q. Well then, what is your answer to the question?

A. The part on the model is the same as on 91.

Q. Your answer then is that both the model, Exhibit 13, and the structure shown on the chart, Exhibit 6, have a part marked 91; is that right?

A. Yes.

Q. And your patent here in suit does not show that part 91; is that right?

A. That is right. I mean the patent drawing don't show it.

Q. You mean the drawings of your patent here in suit do not show the part 91?

A. 91, no. It is just simply duplication from the top.

Mr. Fryer: Just a minute. I move to strike the voluntary statement of the witness, if your Honor please.

The Master: No. I think it is a proper explanation.

Mr. Fryer: It is an expression of a conclusion, as I think. It started out to be, your Honor.

The Master: Let's have what was said read.

(Last answer of the witness read.)

Mr. Fryer: Now read the question, please, Mr. Reporter.

(Last question read.)

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: I will put it another way.

Q. Neither the drawings nor the descriptions of your patent here in suit show or describe a part like the part 91 on Exhibit 6; is that correct?

A. I think that is described in the patent. [247]

Q. All right. Will you point out in patent Exhibit 2 where the specification describes the part 91 shown on the chart 6.

A. I don't—

Q. Have you got the patent there?

A. It don't describe by number, no.

Q. Well, does it describe it in any other way than by number?

Mr. Geisler: You mean, Mr. Fryer, specifically—

Mr. Fryer: Just a minute, please. I object to having the cross examination interrupted by interrogation of counsel.

Mr. Geisler: I think it is fair to the witness. When you speak of a patent you take into consideration everything, the claims—

Mr. Fryer: We object to coaching the witness, if your Honor please, by the statement of counsel.

The Master: I don't think that is coaching.

Mr. Geisler: The patent should be read as a whole, your Honor, and I think the question should be put, Does he find specifically those parts, or those specific parts in the specifications and drawings?

The Master: I can't control the method of cross examination.

Mr. Geisler: No. I then object to the question as misleading to the witness.



(Testimony of Carl F. Gerlinger.)

Mr. Fryer: May I have the question read, if your Honor please?

(Last question read.)

The Master: The question is perfectly fair. Objection overruled.

The Witness: What is the question?

(Last question re-read.)

A. Yes.

Q. (By Mr. Fryer) Are you referring now to the specification, the description or the claims?

A. The specification.

Q. At what page and line? [248]

A. On page 1 and—just let me look through here. Well, the claim on the first page, which states—

Q. What line, please?

A. 20, "Another object is to provide a form of automatic stop for the lifting device that will operate when the limit of movement in either direction is reached, and also apply a brake mechanism."

Q. Do you find any other place in the description of the mechanism shown in the drawings wherein the part 91 shown on Exhibit 6 is described in your patent?

A. You will have to let me read that through. (Witness peruses patent.) The only thing I see so far, I find, "Other details may be varied in form and location, and in general the invention is intended to be limited only by the scope of the appended claims."

(Testimony of Carl F. Gerlinger.)

The Master: Where are you reading from, Mr. Gerlinger?

A. From the description.

The Master: Yes, what line, what page?

A. Seventy-five.

The Master: On the first page?

A. On the second page. Yes, second.

Q. (By Mr. Fryer) All right, now, will you point out the words which you find in the patent, or the parts which you find in the drawings of your patent, which show that the machine of your patent has a part 91 which when it moves upwardly strikes the bell crank lever and throws the clutch to neutral? A. Give me that statement again.

(The question was thereupon read.)

A. The patent don't describe—it describes it, but the patent drawings don't show it. As I stated before, this change was made after the patent drawing was sent in, and that is just a duplication of this.

The Master: When you say “that is a duplication of this” it doesn't get into the record. When you speak of “that” what [249] are you referring to on this drawing 6? You say “that is a duplication of this”. Now, which is “that”—

A. 65 is a duplication of 91—I mean 91 is a duplication of 65. That is correct.

The Master: Now, when you say it is a duplication of it, in actual operation why is it a duplication?

A. This controls the downward stop and this controls the upward stop (indicating).

(Testimony of Carl F. Gerlinger.)

The Master: And why is it a duplication?

A. Well, you see, it has the same function.

The Master: Well, one controls the function of an operation in one direction and one in the other?

A. Yes.

The Master: Could you eliminate number 91 and get the same result?

A. Well, you could eliminate 91. It is not so important as the 65.

Q. (By Mr. Fryer) In one of your preceding answers you said these drawings were sent out before, or were sent at an earlier date. What did you mean by that?

A. Well, the drawings were sent in January—the patent drawing was sent in in January, and then——

Q. January of what year?           A. 1922.

Q. When you say patent drawings do you mean your signed application for the patent here in suit?

A. Yes, the patent on that—the patent in suit.

Q. When did you sign your application for the patent here in suit, before or after you sent in the drawings you refer to?

A. Before I made the change.

Q. All right, now, let's get this straight. As I understand your testimony, you prepared your application for the patent here in suit and forwarded it to your attorneys, Baldwin & [250] White, in Washington?           A. Yes.

Q. And then after that you made the change by which you incorporated 91 in the mechanism, is that right?

(Testimony of Carl F. Gerlinger.)

A. In the second machine, yes, that is right.

Q. So that the drawings and the description as you prepared it and sent it to Baldwin & White did not show the part 91 of Exhibit 6, is that true?

A. That is true.

Q. Now, in those drawings as you sent them to Baldwin & White to file in the Patent Office the only part which functioned to stop the load-lifting means in the upward direction was the part 67, is that right?      A. 67.

Q. Is your answer yes?      A. With the load.

Q. Now, let me get a direct answer, Mr. Gerlinger. The question is this: In the drawings which you sent to Baldwin & White for filing for the application for your patent here in suit, the only part which stopped the upward movement of the load-lifting means is the part 67 in the drawings of that patent, is that right?

A. That is right. As—the description, I mean, will show it here.

Mr. Fryer: I move to strike the volunteered statement of the witness, your Honor.

The Master: Overruled.

Mr. Fryer: May I have the last question read, please, and the last answer, please?

(The last question and the answer thereto were thereupon read.)

Q. (By Mr. Fryer) And in those drawings as you sent them to Baldwin & White and as they are contained in your patent in suit the part 67 func-



(Testimony of Carl F. Gerlinger.)

tions to put the clutch in neutral only [251] when the load in the machine pushes that part 67 upwardly, is that right?      A. That is right.

Q. As I understand your previous testimony, you made about ten machines in which there was contained a bar or member like 67 which put the clutch in neutral only when the load of lumber struck that bar, is that right?

A. That is right.

Q. I think the last one of those machines that was made by you or your company was made about in 1922, is that correct?

A. I wouldn't say that is correct, but the record would show.

Q. What record do you refer to?

A. Corporation records.

Q. Have you any recollection of your own on that subject?      A. I would say '23.

Q. About in 1922 or '23?

A. '23. I mean we made—we built similar—I mean—you have reference to this bar? You have reference to this bar?

Q. The question was directed to when you last made or sold a machine containing a bar like the bar 67 of your patent which put the clutch in neutral when the load in the machine struck that bar, and I want to know when, about, you made the last machine of that kind?      A. About '23.

Q. And after that time your company, the plaintiff here, put on the market a hydraulically operated

(Testimony of Carl F. Gerlinger.)

carrier instead of a machine with the bar 67 in it, is that right?      A. That is right.

Q. And after your company had developed this hydraulically operated carrier which it put out in '22 or '23 it manufactured and sold that type exclusively for some years, is that right?

A. Yes. [252]

Q. Now, do you remember about how long that was that you made and sold that hydraulic machine—and by you I mean your company?

A. Up to about '28, 1928.

Q. I think you took out some patents on some of the features in that hydraulic machine, didn't you?

A. Yes. Yes.

Q. Do you think you could recognize any of those patents that you took out on that hydraulic machine?      A. Yes.

Q. Made and sold by the Dallas Machine & Locomotive Works?      A. Yes.

Q. I show you a copy of Patent Number 1480257, issued in January of 1924, and ask you to state whether or not that is one of the patents which you obtained on the hydraulic machine of the Dallas Machine & Locomotive Works?

A. That is right. That is correct.

Mr. Fryer: May I have marked for identification the Gerlinger patent Number 1480257 just identified by the witness? That will be Exhibit Number 14 for identification?

(Testimony of Carl F. Gerlinger.)

The Master: 14 for identification?

(Patent Number 1480257 referred to was thereupon marked for identification Respondents' Exhibit 14.)

Q. (By Mr. Fryer) Now, those hydraulically operated machines manufactured by Dallas Machine & Locomotive Works from 1922 or '23 until 1928 had no automatic limit stops to automatically stop movement of the load-lifting device at pre-determined upper and lower limits, did they?

A. They sure had.

Q. You didn't say anything in these patents which you took out which was not true concerning these hydraulic elevators, did you?

A. Huh?

(The question was thereupon read.) [253]

A. No, I did not.

Q. Would you say, then, that it is a false statement in the patent Exhibit 14 for identification where it states that the hydraulic machine there shown had no automatic upper or lower limit stops?

A. I wouldn't say that that is a false statement, no.

Q. That statement was probably true, wasn't it?

A. That is true.

Q. Did the hydraulic machine which was put out by the Dallas Machine & Locomotive Works from 1922 or '3 to 1928 have a brake on the power-transmitting means automatically applied upon the operation of an automatic limit stop?

A. I couldn't answer—I couldn't answer that question. I don't remember.

(Testimony of Carl F. Gerlinger.)

Q. You don't remember that point?

A. No.

Q. How many of these hydraulically operated carriers did Dallas Machine & Locomotive Works make between 1922 or '3 and 1928?

A. Our secretary-treasurer can answer that better. I don't remember.

Q. Have you no recollection?

A. Well, I didn't check the number.

Q. Have you no recollection whatever of the approximate number?

A. I recollect how many we built with rack and pinion type, but not with hydraulic.

Q. Do you remember whether or not you made one a year during those years?

A. Oh, no, no; we made quite a few, but I don't remember the number. As I say, our Secretary-Treasurer can give you that better than I can.

Q. Well, I just want it roughly, Mr. Gerlinger. Was it as many as a hundred a year that you made of the hydraulic machines from '22 or '23 to '28?

A. Oh, not a hundred a year, no; I wouldn't say—my estimate, total about one hundred forty to one hundred fifty. [254]

Q. All told?

A. I mean in the hydraulic.

Q. Yes.

A. We had 105 with the rack and pinion.

Q. Did you have anything to do with the manufacture or the sale of these hydraulic machines on which you took out patents?



(Testimony of Carl F. Gerlinger.)

A. You bet I had!

Q. Did you consider the presence or absence of a brake or hoisting mechanism on those hydraulic machines as a matter of any importance at all?

A. On the hydraulic? What is the question, please?

Mr. Fryer: Will you read it, please?

A. What was this question?

(The question was thereupon read.)

A. Yes. Yes, it is. I considered them very important, on the hoist.

Q. To the best of your recollection today, though, there was no brake automatically applied in those hydraulic elevators to the hoisting mechanism whenever the operation of the load-lifting means was terminated, is that right?

A. Give me that question again.

(The question was thereupon read.)

A. That is right.

Mr. Fryer: If the Court please, may I have the patent Exhibit 14 for identification for just a moment? With respect to the hydraulic carriers which your company put out between 1922 or '3 and 1928, it was true that the mechanism was such that automatic stops and holding mechanism are thereby dispensed with, is that right?

A. Well, automatic—you mean the governor is entirely from automatic stop.

Mr. Fryer: I move to strike the answer, if your Honor please, [255] on the ground that it is not re-

(Testimony of Carl F. Gerlinger.)

sponsive. I think the defendants are entitled to a direct "yes" or "no" answer, with whatever explanation the witness wishes to make.

The Master: I think so. Read the question to the witness. The witness will please answer the question as put.

(The question was then read.)

A. I wouldn't call it automatic stops. It is entirely different. Hydraulic is entirely different from a mechanical standpoint.

Q. (By Mr. Fryer) Can't you answer that question "yes" or "no" and then make an explanation?      A. No.

Q. You can't answer it?

A. No, I can't answer you that way.

Q. All right, I will ask another question: In your patent Exhibit 14 for identification, in which you were describing the hydraulic carriers of your company, will you state whether or not what I am about to read to you from that patent was a true or a false description of the mechanism of those carriers: "Automatic stops and holding mechanism are thereby dispensed with, since when the lifting shoes are moved to one extreme position the pressure will be held uniform and thereby hold them in said position until the control valve is turned to release the pressure and move the pistons in the opposite direction." Now, was that a true or an untrue statement concerning the operation——

A. That is a true statement——

(Testimony of Carl F. Gerlinger.)

Q. Wait a minute; just let me finish my question. Was that a true or an untrue statement with respect to the operation of the hydraulic carriers put out by your company from 1923 to '28?

A. That is a true statement, but——

Q. Those hydraulic machines put out by your company during the years I have referred to were considered by your company superior [256] machines to the machines first built by you having the construction and operation shown in your patent in suit; that is true, is it?

A. That didn't prove it so.

Mr. Fryer: May I have that answer, please?

(The answer was thereupon read.)

A. No, that didn't prove it so, while we came back to the same machine again later.

Mr. Fryer: May I have the question and answer, if your Honor please?

The Master: Read the question and answer.

(The question and the answer thereto were thereupon read.)

Mr. Fryer: I move to strike the answer as not responsive. The question is in the past tense, as to what was then considered, your Honor.

The Master: What you are trying to find out from the witness, isn't it, Mr. Fryer, was whether or not during the period they were putting out the hydraulic machines they considered them to be superior to the old mechanical type?

Mr. Fryer: Yes, your Honor.

(Testimony of Carl F. Gerlinger.)

The Master: During the time you were putting out the hydraulic machines did you consider the hydraulics a superior device to that of the old mechanical pinion device?

A. At that time, yes.

The Master: Now, then, if you have any explanation to make you may make it.

Q. (By Mr. Fryer) As a matter of fact, you informed your trade in carriers during that period of time that the hydraulic load-lift principle of your carriers had marked a new turn in carrier operation, is that correct? A. Yes.

Q. One of the reasons that you advanced to your trade for that statement concerning your hydraulic carriers was that the hydraulic [257] carrier had no couplings, knuckles, cables or screws to break nor gears to strip, such as machines shown in your patent, is that right? A. That is right.

Q. You advertised those hydraulic carriers of yours extensively in various ways, didn't you, Mr. Gerlinger? A. Not very extensively, no.

Q. You published advertisements in such trade journals as *The Timberman*, did you?

A. Yes.

Mr. Fryer: If your Honor please, may I ask that the witness be instructed to wait until I finish the question before he answers, as it is hard for the reporter to hear the answer when he interrupts?

The Master: Yes, Mr. Gerlinger, wait until he completes his question before you answer.

A. All right.



(Testimony of Carl F. Gerlinger.)

The Master: Because it is hard for the reporter to get both of you when you are talking at the same time. All right, read the question.

(The question and the answer thereto were thereupon read.)

Q. (By Mr. Fryer) Your company was a subscriber to The Timberman practically throughout the period of time that it manufactured and sold lumber carriers or elevators, is that true?

A. I don't get that question.

(The question was thereupon read.)

A. The elevators? That is something new to me.

Mr. Fryer: I move to strike the answer, if your Honor please. A. That is not true.

Mr. Fryer: Ask to have the question read to the witness.

The Master: The motion will be overruled, but you may read the question to the witness, and I will ask him to listen care- [258] fully and make an answer to the question.

(The question was again read.)

A. That is not true.

Q. (By Mr. Fryer) You mean that you did not subscribe to The Timberman at any time?

A. That is true.

Q. You subscribed to The Timberman practically throughout the period of time that your company manufactured and sold these machines for elevating and carrying lumber, is that right?

A. Yes, that is right.

Q. I suppose you read the various issues of The Timberman to see that your ad was properly con-

(Testimony of Carl F. Gerlinger.)

tained therein whenever you put in an advertisement of your carrier?

A. Well, I usually leave that up to the advertising man.

Q. You yourself never checked any of your advertisements which were put in *The Timberman*, did you?

A. Quite often.

Q. When you did that did you do it by looking at the particular issue of *The Timber* in question?

A. I didn't quite get that.

(The question was thereupon read.)

A. Naturally I would.

Q. And you were not the only one who was advertising carriers in *The Timberman*, were you? Did some of your competitors advertise in there also?

A. Yes.

Q. One of those competitors was the Ross Carrier Company of Benton Harbor, Michigan, is that true?

A. That is true.

Q. I show you the October, 1926 issue of *The Timberman* and call your attention to the advertisement appearing on page 65 over the name "Dallas Machine & Locomotive Works, Dallas, Oregon", and ask you to state if that is one of the advertisements of [259] the hydraulic lumber carrier which you have stated was made by your company?

A. That is right.

Mr. Fryer: Now, if your Honor please, maybe it will shorten the procedure if the usual——

A. Ordinarily—wait a minute——

Mr. Fryer: Just a moment, Mr. Gerlinger,——

(Testimony of Carl F. Gerlinger.)

The Master: Just a moment. Wait until we hear from counsel, then you may make any inquiry. Go ahead, Mr. Fryer.

Mr. Fryer: I was about to suggest that it might shorten the hearing if instead of following the usual procedure we may be able to offer these exhibits out of order on cross examination of the other side. If not, I should like to have them marked for identification and offer them later.

The Master: Well, unless there is objection on the part of the other side you may proceed in that manner. Do you object to that method?

Mr. Geisler: No, your Honor. In listening to this matter I can't see the effect of direct examination, it isn't proper cross examination, but I am willing to let it all go in so that your Honor may be fully informed. I have no objection.

The Master: All right, it may be understood, then, that either party may offer exhibits on cross examination.

Mr. Fryer: That being the case, I will now offer in evidence the exhibit marked for identification as number 14, being patent number 1480257.

The Master: Is there objection to that Exhibit?

Mr. Geisler: Well, I imagine it will go in as the defendants' exhibits, not as ours.

The Master: Oh, yes, they will go as defendants' exhibits. Whoever offers the exhibit, it will go in as that party's exhibit.

Mr. Geisler: Yes, your Honor. Very well, no objection. [260]



(Testimony of Carl F. Gerlinger.)

The Master: Very well, it may be received as Exhibit 14.

(Said patent number 1480257, heretofore marked for identification Respondents' Exhibit 14 was thereupon received in evidence.)

The Master: Now, Mr. Gerlinger, you had some comment to make or question to ask and I had to interrupt you. I would be glad to have you proceed now.

A. What I wanted to try to say, your Honor, that this advertisement, I wouldn't state if the Dallas Machine & Locomotive Works put that advertisement in or our agent. We had a distributor them days. That is why I made the statement that we did, but I am not sure of that.

Q. (By Mr. Fryer) Is it your testimony, then, that you don't know whether or not the advertisement at page 65 of the October, 1926 Timberman is a proper advertisement of your hydraulic carrier?

A. No, I mean on that particular one I am not.

Mr. Fryer: In view of the witness's statement, your Honor, we merely mark for identification, then, the advertisement, because he seems to have some doubt about it, and ask that it be marked—

The Master: It will become Respondent's Exhibit 15 for identification.

(Page 65 of The Timberman for October, 1926 was then marked for identification Respondents' Exhibit 15.)



(Testimony of Carl F. Gerlinger.)

The Master: Do you desire it returned to you, Mr. Fryer?

Mr. Fryer: I think probably——

The Master: Do you desire it returned to you, at this time?

Mr. Fryer: No, thank you; it may be there for the time being.

The Master: All right, proceed. [261]

Q. (By Mr. Fryer) In presenting your hydraulic carrier to the trade you also emphasized that such hydraulic carriers revolutionized lumber carriers and were superior to the old-fashioned mechanical chain- or screw-lift type of carrier, is that right?      A. That is right.

Q. One of the advertisements in which that feature was brought out is shown at page 113 of the November, 1926 issue of *The Timberman*, which I now show you, is that true?

The Master: 1926?

Mr. Fryer: Yes, your Honor.

A. I answer the question the same that I did before.

Q. What do you mean by the same as you did before?

A. That was—that ad was put in by our agent.

Q. When you refer to your agent you mean Gerlinger-Stevens Engineering Company?

A. Yes.

Q. Who was the Gerlinger named in that company, the Gerlinger-Stevens Engineering Company?

(Testimony of Carl F. Gerlinger.)

A. Well, there was no Gerlinger connected with it. We only used the name Gerlinger on account of the Gerlinger carrier.

Q. That was an organization in Portland, Oregon selling Gerlinger carriers, is that right?

A. Yes, that is right.

Q. You have no quarrel, have you, with the assertions made in that advertisement concerning your hydraulic carrier at that time, have you?

A. No.

Mr. Fryer: We ask to have it marked for identification, page 113 of the November, 1926 issue of *The Timberman*, as Defendants' Exhibit 16.

The Master: It becomes 16. It is marked for identification?

Mr. Fryer: Yes, your Honor. [262]

The Master: Very well.

(Said page 113 of *The Timberman*, issue of November, 1926, was thereupon marked for identification Respondents' Exhibit 16.)

Q. (By Mr. Fryer) I now show you pages 216 and 217 of the same issue of *The Timberman* for November of 1926, and ask you to state whether that is one of the advertisements of one of your competitors, the Ross Carrier Company, which you have referred to a moment ago, showing the Ross carrier which you have stated—

A. That is a Ross carrier, the latest model.

Mr. Fryer: I now wish to have marked for identification as Defendants' Exhibit 17 pages 216 and

(Testimony of Carl F. Gerlinger.)

217 of the November, 1926 issue of *The Timberman*.

The Master: 216 and 217 become Respondents' 17 for identification.

(Said pages 216 and 217 of *The Timberman*, issue of November, 1926, were thereupon marked for identification Respondents' Exhibit 17.)

Q. (By Mr. Fryer) Next I show you page 207 of the May, 1926 issue of *The Timberman*, appearing over the name of Dallas Machine & Locomotive Works, and ask you whether that is an advertisement of the Gerlinger hydraulic carrier which you have referred to? A. That is right.

Q. That was one put out by the plaintiff in this case, Dallas Machine & Locomotive Works?

A. Yes.

Mr. Fryer: We now offer in evidence page 207 of the May, 1926 issue of *The Timberman*, if your Honor please.

The Master: Any objection? Have you seen it?

Mr. Geisler: No, I haven't, but then I—this is a copy, is it? I might ask for information from counsel what the pur- [263] pose of all this evidence relative to hydraulic lifts or hydraulic lumber carriers is, as it is not, certainly, cross examination of anything that the plaintiff has introduced here.

Mr. Fryer: If your Honor please, we have a very good answer to that question but we can't make it here without defeating the purpose of the cross examination, and under those circumstances we ask leave to connect up this subject matter with the issues in the case later on.



(Testimony of Carl F. Gerlinger.)

Mr. Geisler: In that case, your Honor,—

The Master: I don't think I shall let the matter go at large, but I shall permit you to finish the cross examination of this witness upon that subject before answering the inquiry.

Mr. Fryer: I shall be very glad to do that, your Honor, but it would completely defeat the purpose of cross examination to answer in any detail Mr. Geisler's question.

The Master: Well, I appreciate that situation sometimes arises, so I will permit the cross examination, but when the witness is excused then I shall ask counsel to answer your inquiry and you may then make appropriate motions with regard to this testimony.

Mr. Geisler: Yes. I reserve, then, the right to move to strike out all the testimony.

The Master: It will be reserved to you.

Mr. Fryer: This offer having been one to go in evidence and not merely one for identification, we ask at this time to substitute a photostatic copy for the original, in order that the original may be returned.

The Master: That may be done. Number 18.

(Said page 207 of *The Timberman*, issue of May, 1926, was thereupon received in evidence, and a photostatic copy thereof substituted for the original and marked Respondents' Exhibit 18.) [264]

Q. (By Mr. Fryer) I now show you the June, 1925 issue, or a copy of the June, 1925 issue, of



(Testimony of Carl F. Gerlinger.)

The Timberman, and particularly the advertisement appearing at page 217 over the name of Dallas Machine & Locomotive Works, and ask you to state whether that is one of your advertisements of your hydraulic lift?      A. That is correct.

Mr. Fryer: We now offer in evidence page 217 of the June, 1925 issue of The Timberman and ask that it be marked Defendants' Exhibit 19.

The Master: Any objection to the receipt of this in evidence?

Mr. Geisler: Subject to my reservation, your Honor.

The Master: Subject to your reservation.

Mr. Fryer: And likewise we ask leave to substitute for that original, if the Court please a photostatic copy of that exhibit.

The Master: That will be the order.

(Said page 217 of The Timberman, issue of June, 1925, was thereupon received in evidence, and a photostatic copy thereof was substituted and marked Respondents' Exhibit 19.)

Q. (By Mr. Fryer) Now, in the Gerlinger hydraulic carrier put out in June of 1925 were there any exclusive Gerlinger features which gave those hydraulic carriers the remarkable performance described in that advertisement?

Mr. Geisler: I shall object to that question, your Honor. I don't think it has the slightest thing to do with this case.

(Testimony of Carl F. Gerlinger.)

The Master: Well, unless counsel can show some materiality to that question I shall sustain the objection. What do you claim for it? Merely the question of whether they are making extravagant claims in advertising?

Mr. Fryer: No, your Honor, it has a very definite and specific purpose, and my answer is still the same. I beg your indulgence for the time being.

The Master: Very well, I shall permit the question to be [265] put, reserving to counsel the right to move to strike. Will you read the question to the witness, and he will please answer it.

(The question was thereupon read.)

A. It sure was, for a carrier.

Q. (By Mr. Fryer) Will you name the first of those exclusive features in that hydraulic carrier which gave it that performance you there advertise?

Mr. Geisler: Pardon me, all this continuing examination will be subject to the final ruling.

The Master: I think I shall excuse the witness and ask him to retire to the witness room, so that—and I will hear counsel on that. You may step aside, Mr. Gerlinger.

Mr. Fryer: The character of this examination as cross examination is established by the fact that this witness on direct stated that he first had knowledge of the construction here complained of as an infringement just a few months before the filing of the bill of complaint. In other words, he anticipated

our defense of laches. All of this evidence is directed to the defense of laches as one of the points in connection with the defense. \* \* \* Furthermore, the evidence is material to show that the patentee himself has abandoned and discontinued the manufacture of a machine containing the characteristic features of the drawings of this patent in suit, and that goes to the merit of the invention and the scope which should be accorded to it, and for that reason the defendants are satisfied that the evidence being brought out on this cross examination is material and necessary to their cause.

\* \* \* \* \*

With respect to the Ross carrier advertisement which counsel refers to, the purpose of this examination with respect to these publications is for still another objective. There are two defendants in this case. The defendant Clark and Wilson Lumber Company is a large user of lumber carriers, and it uses two different [266] kinds of lumber carriers, one made by the Ross Carrier Company and one made by the other defendant in this case, the Willamette-Hyster Company. One of those Ross carriers, or two of them, it has used ever since 1923, and we will show in the evidence to come that that construction is substantially identical with the construction of the Willamette-Hyster Company charged to be an infringement. The cross examination here is developing the fact that this witness had, or must have had knowledge of that construction



which infringes if ours does ever since he looked at these publications away back in that early day, and it is material and necessary to prove the knowledge on the part of this witness which he now disclaims, so it would be a serious deprivation of the rights of the defendant to be prevented from going into these matters with this witness, which is largely the way, their only way, of proving it.

The Master: \* \* \* Well, I will permit you to offer testimony which may tend to prove knowledge prior to September, 1935 of the existence, not of the Ross carrier but of the Willamette-Hyster's carrier. That will be the ruling. I may say, however, that the practice is before the Master that you may take the testimony over the Master's ruling.

Mr. Fryer: That is pursuant to Rule 46, if the Court please?

The Master: Yes.

Mr. Fryer: And then may I have the Court's instructions as to whether or not we are to enter exceptions to the Court's ruling here, in view of the rather unusual wording of the last paragraph of the Order of Reference? The practice with which I am familiar requires the party to note an exception upon a ruling of that character under Rule 46, and unless advised to the contrary by the Court I shall follow that practice and note an exception.

The Master: The practice in this district since I have been Master has been to provide at the beginning of the case that any party objecting or moving



to question or testimony is allowed the [267] exception as a matter of course, and that will be the order here unless counsel desire the strict rule followed.

Mr. Fryer: That is quite satisfactory to us, your Honor.

The Master: Is that satisfactory to you, Mr. Geisler?

Mr. Geisler: Perfectly.

Mr. Geisler: With regard to this decree, as I take it, your Honor, we are not going into the matter of damages or recovery, but we are just going to the point of having determined whether the patent is valid and whether there has been an infringement, because I think the other should be taken up after the one question has been disposed of.

The Master: Well, I may say to both counsel, so far as any recommendation the Master will make in this case to the Court it will be upon the sole question as to whether or not the Willamette-Hyster device infringes or does not infringe upon that of the patent and whether or not the patent itself is valid, but I shall not undertake to make any recommendation to the Court as to the decree upon any other device.

Mr. Geisler: Yes, sir.

(The witness thereupon returned to the presence and hearing of the Master and resumed the witness stand and was examined and testified further as follows:)

(Testimony of Carl F. Gerlinger.)

The Master: Now, will you read the last question?

(The last question was thereupon read.)

A. Well, that——

Mr. Fryer: Now, wait a moment——

A. Well, it have four hydraulic cylinders, one cylinder on each corner, with automatic governor and clutch and automatic—I mean an operating valve.

Q. (By Mr. Fryer) Was one of the exclusive features of that Gerlinger hydraulic carrier a brake which was automatically applied [268] when an automatic stop ended upward or downward movement of the load-lifting device?

Mr. Geisler: Just a moment. I may not understand your Honor's ruling, but I believe I shall object. I object to the question as immaterial and irrelevant. We are not concerned with a hydraulic lift here. We are concerned only with a mechanically operated lift.

The Master: It will be received solely upon the proposition that the plaintiff has already given testimony, given testimony upon direct examination, as to the extent of the use of the device, of machines including the device in the patent; in other words, upon the question of commercial success. You may answer. Was that question answered?

The Reporter: No, not yet.

The Master: You may answer the question, Mr. Gerlinger.

(Testimony of Carl F. Gerlinger.)

A. What—— [269]

The Master: The question was whether or not the hydraulic machine which was advertised contained any braking device. That is correct, is it not?

Mr. Fryer: In substance, yes, your Honor.

A. No braking device, no.

Q. (By Mr. Fryer) I now show you a copy of the May, 1924 issue of *The Timberman* and the advertisement appearing at page 147 entitled "Gerlinger Lumber Carrier", and ask you to state whether that is one of the advertisements of your company's hydraulic carrier put out by it?

A. Yes.

Mr. Fryer: I now offer in evidence page 147 of the May, 1924 issue of *The Timberman* and ask to substitute for that original page a photostatic copy thereof and that it be marked Defendants' Exhibit 20.

The Master: Any objection, Mr. Geisler?

Mr. Geisler: No, your Honor. This may be taken—as I understand, all of this is merely for the purpose of,—upon the issue of commercial success?

The Master: That is all I am receiving it for.

Mr. Geisler: All right.

The Master: It may be received and marked Respondents' Exhibit 20.

Mr. Geisler: It may go on on that line.

The Master: Very well.

(Testimony of Carl F. Gerlinger.)

(Said page 147 of *The Timberman*, issue of May, 1924, was thereupon received in evidence, and a photostatic copy thereof was substituted for the original and marked Respondents' Exhibit 20.)

Q. (By Mr. Fryer) Likewise I show you a copy of the December, 1925 issue of *The Timberman*, and call your attention to the advertisement appearing at page 147 thereof over the name of Dallas Machine & Locomotive Works and ask you if that also is [270] one of the advertisements of your hydraulic carriers put out by your company?

A. Yep.

Mr. Fryer: I now offer in evidence page 147 of the December, 1925 issue of *The Timberman* and ask to substitute a photostatic copy for the original thereof and that it be marked Defendants' Exhibit 21.

The Master: So marked and received.

(Said page 147 of *The Timberman*, issue of December, 1925, was thereupon received in evidence, and a photostatic copy thereof was substituted for the original and marked Respondents' Exhibit 21.)

Q. (By Mr. Fryer) I now show you the advertisement appearing at page 170 of the December, 1925 *Timberman* and ask you to state whether or not you recognize the machine shown in the advertisement at that page as one of the machines sold in competition with yours?



(Testimony of Carl F. Gerlinger.)

The Master: What was that page, Mr. Fryer?

Mr. Fryer: 170, your Honor.

A. What was that question, please?

(The question was thereupon read.)

A. That is right.

Mr. Fryer: I now offer in evidence page 170 of the December, 1925 Timberman and ask to substitute a photostatic copy of that page and that it be marked Defendants' Exhibit 22.

The Master: It will be so received and marked and the substitution made.

(Said page 170 of The Timberman, issue of December, 1925, was thereupon received in evidence, and a photostatic copy thereof was substituted for the original and marked Respondents' Exhibit 22.)

Q. (By Mr. Fryer) Will you state whether or not any of the manufacturers of any of the competing carriers illustrated in the [271] advertisements referred to so far were licensed by you or your company under the patent in suit?

A. I didn't get that quite correct.

(The answer was thereupon read.)

A. No.

Q. None of those competitors of yours were working under a license from your patent in suit?

A. No.

Q. The answer is that none of them were?

A. Yes.

(Testimony of Carl F. Gerlinger.)

Q. Now I would like you to look at the December, 1928 issue of *The Timberman*, and the advertisement appearing at page 165, and ask you to state whether that also is one of the advertisements of your hydraulic carrier put out by your company?

A. That is right.

Mr. Fryer: I offer in evidence, pursuant to the procedure followed, a photostatic copy of page 165 of the December, 1928 issue of *The Timberman*, and ask that it be marked Defendants' Exhibit 23.

(The photostatic copy of page 165 of *The Timberman*, issue of December, 1928 was thereupon received in evidence and marked Respondents' Exhibit 23.)

Q. (By Mr. Fryer) All of the Gerlinger machines as shown in the various advertisements referred to so far were adapted for hauling various kinds of products in industry, is that true?

A. That is true.

Q. They haul brick and cement and all sorts of industrial products, is that correct?

A. That is right.

Q. They are not confined solely to the use of hauling lumber, is that true? [272]

A. No, that is right.

Q. You have pointed that fact out to the trade in your various advertisements, and so forth?

A. That is correct.

Q. Now, after all this period of advertising the hydraulic type [273] of carrier the first time that

(Testimony of Carl F. Gerlinger.)

your company advertised a different type of carrier, not hydraulic, was about in March of 1929, is that right?

A. May I—I wouldn't make that statement, '29. I don't remember.

Q. Well, to refresh your recollection in that regard I show you the March, 1929 issue of The Timberman, page 117, wherein you bring out the fact that your company was making then both a mechanical and hydraulic lift, and ask you to state whether or not that refreshes your recollection that you first started advertising a machine other than hydraulic in or about March of '29.

A. That is right.

Mr. Fryer: I offer in evidence a photostatic copy of page 117 of the March, 1929 issue of The Timberman, and ask that it be marked Defendants' Exhibit 24.

(Photostatic copy of page 117 of The Timberman, issue of March, 1929, was thereupon received in evidence and marked Respondents' Exhibit 24.)

Q. (By Mr. Fryer) Now, during the years 1922 to the early part of 1929 did you or the Dallas Machine & Locomotive Works manufacture and sell any machine to use as a lumber carrier other than the hydraulic carrier as shown in your various advertisements? A. No.

Q. Now, after you discontinued the hydraulic carrier did the Dallas Machine & Locomotive Works

(Testimony of Carl F. Gerlinger.)

manufacture a carrier having in it a member like the bar 67 on Exhibit 6 which moves the clutch to neutral when pushed by the load in the machine?

A. I would like to hear that question again, please.

(The question was thereupon read.)

A. Yes. [274]

Q. When was that machine having that bar 67 in it constructed subsequent to the termination of your hydraulic carrier?      A. 1929.

Q. Was the——

A. About. About 1929, I will say.

Q. How did the shape of that bar in the machine built in 1929 compare with the bar 67 shown on the Exhibit 6?

A. Practically the same.

Q. How many more machines having a member in it like the bar 67 and having the function of the bar 67 did the Dallas Machine & Locomotive Works make after 1929?

A. Around a hundred.

Q. When did it make the last of those machines containing the bar 67 in it?

A. Oh—I take it back. I am wrong on that question, your Honor. 67, we didn't make any only ten of the machines like this. We didn't make any since '29.

Q. In other words, when you abandoned the hydraulic type of machine in 1929 you did not go



(Testimony of Carl F. Gerlinger.)

back to the manufacture of a machine containing a bar like 67 of your patent, is that right?

A. That is right.

Q. In the machines having a bar like the bar 67, that bar does not perform any work in the machine unless there is a load in the machine which moves upwardly and pushes the bar up, is that true?

A. That is true, yes.

Q. Does it make any difference in the operation of the machine of your patent in suit what sort of motive power is employed to drive the mechanism?

A. Yes, it would.

Q. In other words, your patent could not possibly be infringed by a machine which was operated by a steam engine, is that right?

A. Well, yes, by a steam engine. [275]

The Master: Well, now, what does he mean,—could or could not be?

Mr. Fryer: I am coming to that, your Honor. Your opinion is, now, that a machine which is driven by a steam engine instead of a gasoline engine could or could not contain the invention of your patent?

A. Not with the steam engine, no.

Q. In other words, in order to have the invention of your patent a person must use a gasoline engine, is that right?

A. A gasoline engine.

Q. And no machine or carrier having any kind of motive power other than a gasoline engine would infringe your patent, is that right?

(Testimony of Carl F. Gerlinger.)

A. Well, I don't know, I couldn't answer that question. I think there is a legal question there.

Q. Do you understand the invention of your patent in suit well enough to be able to recognize it when you see it in a construction? A. Yes.

Q. Is it then your opinion as the originator of this supposed invention that you could find it in a lumber carrier having a steam motor instead of a gasoline motor?

A. Well, I would answer this question with the steam would be entirely different than with the gas motor.

Q. Then your answer is that if the machine of your patent were so constructed that the engine in it were a steam engine instead of a gasoline engine it would not contain what you would consider to be your invention, is that true?

A. Well, I wouldn't answer that question. I don't know.

Q. Well, do you consider that the gasoline engine is an indispensable part of the thing which you consider the invention of your patent in suit?

A. What is that question? [276]

(The question was thereupon read.)

Mr. Geisler: I think I will object to that question, your Honor. I don't think it is fair to the witness. It really involves a question at law. Supposing he had a steam turbine, it could be operated. Whether that is or is not the equivalent of a gasoline motor is for your Honor.

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: I have some authorities upon that point, if your Honor please. It is well established that the inventor, who is the appraiser of his invention, is the best judge of that, and cross examination intended to develop what the invention is in his mind is the ultimate test. In the case of Wood against Peerless Motor Car Corporation, 75 Fed. (2d) 554, at page 555, the court there states and holds that the inventor's own appraisal of the nature of the invention is of great importance.

In a similar ruling of the Circuit Court of Appeals for the Sixth District, Smith Corporation versus Lincoln Electric Company, 82 Fed. (2d) 226, 229, the Circuit Court of Appeals said, in passing, "The paper had a substantial function and effect"—paper was the subject matter involved—"which Smith considered essential to his invention. His appraisal of the nature of his invention is of great importance."

And there are further authorities to the same effect.

The Master: Yes, but how does that become important in this particular patent?

Mr. Fryer: Laying foundation for further cross examination, it will give a very definite and succinct definition of what this man really contributed to the art, if anything, and when the cross examination reaches that point I think the purpose of this examination here will be quite clear and prove to be quite helpful.

(Testimony of Carl F. Gerlinger.)

Mr. Geisler: If your Honor please, I would like to——

The Master: You may go ahead.

Mr. Geisler: There is nothing to show that any particular [277] kind of a motor with this particular invention is an indispensable element. If some feature of this particular machine is indispensable, for instance, those stops which control the lift, either up or down, they are indispensable. That, now, whether the substitution, as I take the question—counsel is asking the witness whether the substitution, as for instance, a steam turbine, for a gasoline motor, all other things being the same, whether that is indispensable. Well, I don't think that is a fair question, because it is a legal question. If they base it on the point whether it is a fair equivalent or not an equivalent, that is one thing, but it is illogical to us that if there is any difference between any kind of rotary device connected by a coupling mechanism with the other parts, the raising and lowering mechanism has anything to do with it. Now, I can't see that it has anything to do with this question whatsoever, and I object to it.

The Master: Until I am better advised I shall sustain that objection. I can see in the claim in question an element which may or may not, from a mechanical standpoint, rule out a particular source of power. I will not further particularize it.

Mr. Fryer: May I have the answer to the question under the rule, if your Honor please?



(Testimony of Carl F. Gerlinger.)

The Master: Yes, I will permit you to take the answer under the rule.

A. What was the answer, please?

The Master: Read the question to the witness, please.

A. I mean the question.

(The last question was thereupon read.)

A. Read it to me again. I can't get it through my head.

(The last question was again read to the witness.)

A. Yes. Yes.

Q. (By Mr. Fryer) A machine not having a gasoline engine in it, then, would not be one employing the invention of your patent [278] in suit, would it?

Mr. Geisler: The same objection to that.

The Master: I shall sustain the objection. You may take it over the ruling, if you desire.

Mr. Fryer: I will ask for the answer.

A. What was that question?

(The question was thereupon read.)

A. I couldn't answer that question.

Q. (By Mr. Fryer) Why not?

A. Well, it is a legal question there, to my judgment.

Mr. Fryer: May I have that answer there?

(The answer was thereupon read.)

Q. (By Mr. Fryer) What is legal about it that you don't understand? What word in the question do you not understand?

(Testimony of Carl F. Gerlinger.)

A. Well, steam and gas,—with steam you have to change the construction and principle. It takes a different arrangement entirely.

Q. I suppose your answer would also be that if someone employed an electric motor instead of a gasoline motor in the machine of your patent such a machine would not contain the invention of your patent, is that true?

A. The electric motor would be the same way. You act entirely different. Electric power is not—electricity is an entirely different matter again.

Q. So that as you see it the thing which you created when you made the invention of your patent in suit was one which had a source of power which was a gasoline engine and not an electric motor or a steam engine, is that true?

A. That is right.

Q. Now, will you name the first mechanical factor which indicates to you that a machine with an electric motor in it for raising and carrying lumber would not be the machine of your patent? [279]

A. Well, an electrical would be entirely—the construction would have to be entirely different.

The Master: In what respect?

A. Well, your stop. Electric motor is operated by electricity, so you would have an electric switch——

The Master: Contact switch?

A. Yes, a contact switch, or you stop the motor, and here you do not stop the motor, it is entirely—

(Testimony of Carl F. Gerlinger.)

I think,—I can't make myself believe, Your Honor,—but I think you can prove that the electric power can't compare with it, as the construction entirely would have to be changed. That is my judgment here.

The Master: All right, gentlemen, we will resume.

Q. (By Mr. Fryer) Will you name the first mechanical construction which in your opinion differentiates an electrically driven lumber carrier from the one shown in the drawings of your patent.

The Witness: Let's see. What is the first part of the question there?

(Last question read.)

A. If you use an electrical motor you have got to have a reversible clutch. Is that the question?

Q. What do you say then is the first mechanical structure which differentiates an electrically driven lumber carrier from that shown in your patent?

The Witness: Will you give me that question again?

(Last question read.)

A. I don't know if I can answer that question. If this question is right, an electrical driven, if you used the same—if you use a reversible clutch you can drive that electrically as well as with the gas. Is that your question?

Q. I understand then that in your opinion the first mechanical [280] difference you would have to

(Testimony of Carl F. Gerlinger.)

have to drive your lumber carrier electrically would be a reversible clutch; is that correct?

A. That is right.

Q. The drawings and the description of your patent in suit do not show a reversible clutch?

A. It sure does; don't it?

Q. Will you look at the drawings of your patent in suit and point out what you understand is the clutch in those drawings. May the witness have Exhibit 2, please?

A. On page 1, on line 100, "The lifting device is operated by the following mechanism. Power is transmitted from the shaft 46 of the engine through a reversible clutch of any desired type operated".

Q. So the mechanism shown in your drawings and described in your specification in your patent provides for a reversible clutch; is that right?

A. Reversible clutch, yes.

Q. Now in the drawings that reversible clutch is merely shown from the outside; that is, only the external casing of the clutch is shown in the patent drawings; is that true?

A. Yes, that is true.

Q. And a handle or operating lever is shown extending from that housing as a means to operate the clutch; is that right?

A. Yes, that is right.

Q. In other words, in Figure 2 the reference character 47 points to the housing in which this reversing clutch is supposed to be contained; is that your understanding?

A. Yes.



(Testimony of Carl F. Gerlinger.)

Q. And the lever 48 is shown extending from that housing as a means by which the reversing clutch mechanism of any kind contained in the housing can be operated; is that your understanding?      A. Yes.

Q. All right. Now will you name the next mechanical feature [281] which in your opinion makes it impossible to use the mechanism of your patent in suit with an electric motor.

A. There is no other feature as I know of it.

Q. In other words, the construction and arrangement of your reversing clutch 47 is the thing which you understand makes the invention of your patent peculiarly suited to operation by a gasoline engine; is that right?

A. No, not particularly a gasoline engine.

Q. It could be operated by electric motor as well?

A. Motor, or any source of power, if you use the reversible clutch, but you have to use this reversible clutch with this setup.

Q. And *you* patent shows such a reversible clutch, does it?      A. Absolutely.

Q. And your testimony now, then, is that you can use any source of power in the mechanism of your patent, steam or electricity or Diesel engine, to operate the mechanism of your patent, provided you have this reversible clutch 47; is that right?

A. That is right, yes.

(Testimony of Carl F. Gerlinger.)

Q. What you said before recess to contrary effect is not correct; is that true?

A. Well, I meant this: that you couldn't do it without, if you don't—if you have an electric and take this clutch, or take them out, you couldn't operate it.

The Master: Take what out?

A. I mean if you take any feature out of that reversible clutch you couldn't operate an electric motor.

Q. (By Mr. Fryer) You merely mean to say by that, that your reversible clutch is perfectly well suited to operation by electric motor; is that true?

A. No; no. If you let the motor run one way, when you have got to run one way and you let the motor run and cut the power off by the reversible clutch, all right. [282]

Q. Now I think your testimony has varied a little bit on that question and I want to clear it up, if I can, by just a few simple questions. Is it your understanding that with the mechanism shown in your patent, including the reversible clutch 47, it is possible to operate your mechanism with an electric motor?

The Witness: Repeat that.

(Last question read.)

A. Yes; yes.

(Testimony of Carl F. Gerlinger.)

Q. You can find then the invention of your patent in a lumber carrier having an electric motor as its source of power, can you?

A. Source of power; that is right.

Q. Any source of power?

A. Any source of power.

Q. Electric, Diesel or steam?

A. That is what I tried to bring out there as a legal point, what the power got to do with it.

Q. Now is it your understanding, not as a legal proposition but as a mechanical one solely, that the invention of your patent can be found in a lumber carrier having any source of power, gas, steam or electric?

A. Mr. Fryer, I couldn't understand what you was driving at.

Mr. Fryer: Let's forget the past and just answer this question. May I have the question read, please?

The Witness: You could use any kind of power, any source of power, with a reversible clutch.

Mr. Fryer: Now can I have the question read and get a direct answer to it, please.

(Last question read.)

A. That is right.

Q. In the drawings of your patent are the internal parts of the clutch contained in the housing  
47 shown?

A. They are described, but the drawing don't show, but they are described in the patent. [283]

(Testimony of Carl F. Gerlinger.)

Q. The individual parts themselves?

A. No, not individual parts. The reversible clutch.

Q. In other words, the patent merely attempts to say that in this box 47 you have any kind of a reversing clutch mechanism?

A. Any kind of a reversible clutch; yes, sir.

Q. And all you need to have is some kind of a handle sticking out of that housing, or lever projecting out of the housing to operate the mechanism in the housing 47; is that right?

A. Well, it would have to be automatically controlled.

Q. Well, all that the part 47 needs in order to meet the requirements of your patent is that it shall be a means to control power that can be set in neutral, or in forward, or in reverse position; is that right?

A. Yes.

Mr. Fryer: May I have just a moment, your Honor. We have an enlarged view of the drawings of the patent which may facilitate reference to it, your Honor.

Mr. Geisler: We have another one here, if you want it.

Mr. Fryer: I ask to have marked for identification the enlarged chart placed before the witness as Defendants' Exhibit 25.

The Master: Respondents' Exhibit 25 for identification. Now I understand these are enlarged patent drawings?



(Testimony of Carl F. Gerlinger.)

Mr. Fryer: Yes, your Honor.

(The enlarged patent drawings were thereupon marked for identification Respondents' Exhibit 25.)

Q. Is the brake member 76 in the drawings of your patent a friction brake? A. Yes.

Q. Between what parts of the mechanism does the braking friction occur which is applied by that brake? [284]

A. On the end of the shaft.

Q. When you refer to the shaft, what shaft in your patent do you mean?

A. The extension of 76. I mean the shaft from the worm out, from the worm housing out, right here (indicating.)

Q. When you say "right here" you point to the mechanism shown overlying the lever 76 on the enlarged drawings of your patent? A. Yes.

Q. Now referring to Figure 2 of the drawings of your patent, will you state whether or not this clutch operating lever 48 extends over or under the final drive housing which extends across the frame of your machine?

A. Which lever are you referring to?

Q. Clutch operating member 48.

A. It is running—this is the lever right here—

The Master: When you say "this is the lever", what?

(Testimony of Carl F. Gerlinger.)

Q. (By Mr. Fryer) Will you state whether the clutch operating lever 48, which you just pointed to, extends over or under the final drive housing of the machine shown in the patent drawings? A. Under.

Q. That is what you understand by——

A. Yes.

Q. —the full line marking of the lever 48 shown in Figure 2 crossing over the top of the final drive housing; is that right?

A. Not over the top; under.

Q. You understand that 48 passes under the final drive housing? A. That is it.

Q. And it is not shown in dotted lines in the drawings, Figure 2, to indicate that construction, is it? A. It shows very plainly here.

Q. Do you see the straight black line extending from the upper toward the lower side of Figure 2 which crosses the lever 48? [285] I am merely asking you whether you see that line. A. Yes.

Q. That is the front line of the seat; is that right? A. Yes.

Q. Now that line crosses the lever 48? You so understand the drawing? A. Yes.

Q. And at the point where it crosses the lever 48 the top and bottom lines of the lever 48 are full and not dotted lines; is that correct?

The Witness: Give that question to me again.

Mr. Fryer: Will you read the question?

(Last question read.)

(Testimony of Carl F. Gerlinger.)

A. Are full and not dotted lines. That is right.

Q. Do you understand that in drawings of this kind dotted lines——

A. Yes.

Q. —represent figures that you see through——

A. Yes.

Q. —another part?           A. Yes.

Q. And if a line is solid, that means that you see the part without any other part overlying it?

A. Yes.

Q. Is that your understanding?           A. Yes.

Q. Do you see any part of the lever 48 dotted from the front line of the seat to the clutch 47?

The Witness: Read that question.

(Last question read.)

A. Yes.

Q. It is dotted as you see it, is it?

A. Not in the front; in the back.

Q. Behind the seat?

A. Behind the seat. [286]

Q. But forwardly of the seat no part of the lever 48 is shown in dotted lines; is that right?

A. No.

Q. Well, is it right or wrong?

A. You are right.

Q. Now in front of the seat shown in full lines we also see the final drive housing of your patent; is that right?           A. Where do you show it?

Q. Well, can you see the final drive housing on Figure 2 of the drawings of your patent?

(Testimony of Carl F. Gerlinger.)

A. Yes; right here (indicating).

Q. All right. Now will you tell us whether the lever 48 passes over or under the final drive housing?

A. Under.

Q. It passes under it? A. Yes.

Q. As you see it in Figure 2? A. Yes.

Q. And that is your best understanding of the drawing of the patent; is that right? A. Yes.

The Master: Is 44 the final drive housing?

Mr. Fryer: Yes, your Honor; it is the final drive housing at one end. The other end is a similar structure on the opposite side of the machine.

Q. Now do you know what the reference character 20 in the specification of your patent refers to?

The Witness: Which was that?

Mr. Fryer: Read the question, please.

(Last question read.)

A. No, I don't understand it.

Q. That is the best answer you can make to that question also, isn't it, Mr. Gerlinger? [287]

A. Yes.

Q. Now I call your attention to page 2, lines 125 and 126 of your patent, where reference is made to means for manually moving the clutch to operative position. Is the part of the Gerlinger mechanism there referred to shown in the Gerlinger drawings of your patent in suit?

The Witness: Please read that.

(Last question read.)

A. 125 and 126?



(Testimony of Carl F. Gerlinger.)

The Master: Lines 125 and 126, right hand lower part of page 2, last paragraph.

The Witness: I don't find any such number here.

The Master: What he is referring to is this (indicating)——

The Witness: Oh, in the claims?

The Master: "Means for manually moving".  
Now will you read the question to the witness.

(Last question read.)

A. Sure; yes.

Q. (By Mr. Fryer) Will you give me the number which is applied to that part on the drawings of your patent; and you may refer to the chart. Defendants' Exhibit 25 for identification, before you.

A. By moving—on this the hand lever is not shown here, and is shown 70 on Figure 1.

Q. You refer to the handle 70 in Figure 1?

A. Yes; by moving this lever and engaging the clutch.

Q. Do I understand you correctly then that the part referred to in your specification that I called to your attention, where it says "Means for manually moving the clutch to operative position", is the handle 70 of your drawings?      A. Yes.

Q. Now if you look at line 130 of page 2 of your patent, and lines 1 and 2 of page 3, I will ask you to state whether the [288] part there referred to as "Means for braking the transmitting means whenever the clutch is moved to neutral position", is shown in the drawings of your patent?

(Testimony of Carl F. Gerlinger.)

A. That shows right here (indicating).

Q. What is the number of that part you are pointing to?      A. 74 and 76.

Q. And 74 and 76 are the means for braking the transmitting means whenever the clutch is moved to neutral position, referred to in your patent; is that right?      A. Yes.

Q. Now at lines 127 to 130——

A. And I also—excuse me.

The Master: If you want to explain you may.

Q. (By Mr. Fryer) Do you want to make any explanation?      A. I also include lever 48, see.

Q. What do you mean? You include lever 48 in the means for braking the transmitting means whenever the clutch is moved to neutral position.

A. Neutral position, yes.

Q. Then 48 is the clutch actuating lever; is that right?

A. Yes. There is also the combination together. There is this operative clutch—operative clutch and also the braking means.

Q. Now the part 76, lever 76, is the brake lever itself; is that right?      A. 76, yes.

Q. And the small lever lying below 76 and marked 74 is a lever with a cam at its upper end so arranged that movement of 74 shoves the cam under 76, lifts 76 and thereby applies the brake; is that correct?      A. That is correct, yes.

Q. Now 48 is merely the part which moves the cam lever 74; is that right?

(Testimony of Carl F. Gerlinger.)

A. And also operates the clutch.

Q. We will come to that later, but I am talking about the brake now. [289]

A. Yes.

Q. And as far as the brake is concerned, all that 48 does is to provide movement of the cam lever there; is that right? A. 74 and 76.

Q. Well, I ask you is that right? Is it right or wrong? A. 74 is wrong.

Mr. Fryer: May I have—well, strike it. I will ask it again.

Q. Lever 74 is the lever that carries the cam on it to lift 76; is that right?

A. That is right, yes.

Q. And 48 is the part that moves 74 in order that it may do its work and lift lever 76; is that right? A. That is right; yes.

Q. Now when you say in your patent, “Means for braking the transmitting means”, you have then the parts 74 and 76 which do that work and they are actuated by the lever 48; is that your understanding?

The Witness: Give that question to me again.

(Last question read.)

A. That is my understanding.

Q. Now if you will look at your patent at lines 127 to 130, on page 2, you refer to “automatic means for moving the clutch to neutral position upon a movement of the load lifting means to a pre-

(Testimony of Carl F. Gerlinger.)

determined extent in either direction". Is the mechanism there referred to shown in the drawings of your patent?      A. Yes.

Q. Will you give me a list of the reference characters which are applied to the parts making up that mechanism in the drawings of your patent.

A. Automatic stop, which is fastened on a rack bar, with a lever, move control lever, to move clutch in neutral position and drive the brake. [290]

The Master: That is number what?

A. 44. No—yes.

Q. (By Mr. Fryer) Mr. Gerlinger, I merely ask you to list the numbers applied to the parts constituting that mechanism in your drawings, and you described its operation. For the time being all I would like you to do for the Court is to list the numbers of the parts on the drawings of your patent which constitute the automatic means for moving the clutch to neutral position upon movement of the load lifting means a predetermined extent in either direction?      A. By moving hand lever.

Q. Just give us the numbers of the parts.

A. By moving hand lever——

Mr. Fryer: I move to strike the answer, if your Honor please, as not responsive.

The Witness: 70 in operative position, that will engage clutch 47, and automatic stop 65, will trip that lever 65——



(Testimony of Carl F. Gerlinger.)

Mr. Fryer: May the Court please, I move to strike that answer as wholly irresponsive to the question.

The Master: He is giving numbers but interpolating in them a description of the numbers themselves. While perhaps it is not quite responsive, yet I do not think it is objectionable.

Mr. Fryer: Proceed with your answer, then.

The Witness: Trip 65, and when the shoe travels to the end of the travel will move lever in neutral position and apply the brake, and lever 60—move lever 60—48 and 74.

Q. Mr. Gerlinger, do you know your patent structure well enough just to give me a list of the numbers of the parts— A. Well—

Q. Just a minute. Let me finish my question: a list of the numbers of the parts which constitute the automatic means for moving the clutch to neutral position on movement of the load lifting means to a predetermined extent in either direction? [291]

A. Well, I have to follow them up.

Q. Well, just give me the numbers. Can you do that, or can't you? A. Yes, I think I can.

Q. All right. Let me have the numbers.

A. 70, 48, 74, and 65, and 66. Offhand I would say they were in general all of them.

Q. You don't consider that the part 67 then has anything to do with moving the clutch to neutral position, or do you?

(Testimony of Carl F. Gerlinger.)

A. I have described——

Mr. Fryer: Just a moment. Answer the question, please.

A. Yes, in the upper movement with load.

Q. Then do you include 67 among the numbers which you would list as constituting the automatic means for moving the clutch to neutral position upon a movement of the load lifting means to a predetermined extent in either direction?

A. Yes, with load.

Q. Now that is all the parts that you have in mind in the drawings?

A. Right offhand. I wouldn't say that I am absolutely right, without following it up closer and giving it a study more.

Mr. Fryer: May I have an order striking the statement by the witness in interruption of my question, and then have the first part of my question read so I may continue it.

The Master: Yes. Strike it out and let the counsel finish his question, Mr. Gerlinger, before you answer. Let him finish his question.

The Witness: Yes.

Mr. Fryer: All right. Now may I have the first part of the question, please?

(The question was read as follows: "Now that is all the parts that you have in mind in the drawing"——) [292]

(Testimony of Carl F. Gerlinger.)

Q. (Continuing) —which are included in the language in your specification which refers to means for moving the clutch to neutral position on movement of the load lifting means to a predetermined extent in either direction; is that right?

A. Yes.

Q. In that enumeration of parts which you have given you have included the hand lever 70. Did you mean to do that?

A. Yes, I mean to do that.

Q. The hand lever 70 is intended for use by the operator in operating the machine?

A. For throwing in the clutch.

Q. Does the hand lever 78 do any work by itself automatically if the operator doesn't move it?

A. Well, the hand lever goes in neutral position.

Mr. Fryer: 70 I should have said. I beg pardon. Correct it to hand lever 70.

(The question as corrected was read as follows: "Does the hand lever 70 do any work by itself automatically if the operator doesn't move it?")

A. No, no. Yes, it does.

Q. What work does the hand lever 70 do by itself and without manipulation by the operator?

A. The hand lever is connected to it.

The Master: The question was, not whether it moved but whether it did any work under the automatic operation. That is your question?

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: That is the question, your Honor.

A. It does the work, yes. Without a lever it couldn't do the work. [293]

Q. That may be a very interesting problem of operation, but what I want to know is this: When your automatic mechanism functions in the machine to throw the clutch in neutral, does the hand lever 70 perform part of the work of pushing the clutch into neutral? A. No; no.

Q. Now you have included in the list of parts described in the specification as automatic means for moving the clutch to neutral position the part 74. Did you intend to do that?

A. 74? Sure.

Q. 74 is the cam lever which actuates the brake 76; is that right? A. Yes, that is right.

Q. Now what part of the work of pushing the clutch into neutral is performed by the brake actuating lever 74? A. 74 operates the brake.

Q. And does that push the clutch into neutral?

A. No.

Q. Then do you say that the part 74 performs any part of the work of pushing the clutch into neutral?

The Witness: Give me that question again.

(Last question read.)

A. The clutch—the clutch and the brake levers are all connected together.

Q. I understand that; but also that you don't want to answer that question directly.



(Testimony of Carl F. Gerlinger.)

A. Sure I want to answer it if I would know how to answer you.

Q. Just a minute. I will put the question again in this form. When the mechanism of your patent operates automatically to push the clutch into neutral, does the brake actuating lever 74 do any of the work of pushing the clutch to neutral?

A. No.

Q. Then we have left, among the parts which you have enumerated [294] which function automatically to move the clutch into neutral, the member 67, which is colored black on this chart, Exhibit 25, the set screw 65, also colored black on this chart, the bell crank lever 66, also colored black on this chart?

A. Yes.

Q. And according to your description the clutch actuating lever 48; is that correct; as the parts which operate automatically to move the clutch to neutral?

A. You say too many figures to think all at once.

Q. All right; I will say it again then and make it simpler for you. Am I correct now in understanding that the parts of the drawings of your patent which do work in moving the clutch to neutral automatically are the member 67, which is struck by the load, the bell crank lever 66, and the set screw 65, and, according to your statement, the operating lever 48?

(Testimony of Carl F. Gerlinger.)

A. The bell crank had nothing to do with the lever 67.

Q. I didn't ask you that, Mr. Gerlinger. I will have to put the question again, if you don't want to answer it directly.

A. Well, I will answer it if——

Q. Is it a fact that in the drawings of your patent, that the parts which do work to push the clutch to neutral when the mechanism operates automatically to stop the load lifting means, are the parts 67, the set screw 65, the bell crank lever 66, and the clutch lever 48? Is that true or not true?

A. Well, I don't know if you got all the members. I wouldn't say if it is true or not true.

Q. You don't know; is that it?

A. No, I wouldn't say without tracing them more out.

Q. Well, do you remember that a few questions ago you stated that the parts in the drawings of your patent which constituted automatic means for moving the clutch to neutral position on movement of the load lifting means a predetermined extent in either direction were the parts 74, 70, 48, 65, 66 and 67? [295] Do you remember saying that?

A. Yes, I remember those.

Q. Yes, now do you remember that in a few subsequent questions we agreed, I thought, that the hand lever 70 and the brake actuating lever 74 included in that list did no part of the work of push-

(Testimony of Carl F. Gerlinger.)

ing the clutch to neutral? Do you remember that?

A. Well, I still claim——

Q. Or do you disagree with that?

A. I still—I don't—I wouldn't say. I am kind of mixed up on it. I don't want to say until I am right in my mind.

Q. Well, you said it once. Now do you want to take it back?

A. No, I don't want to take it back, except I studied it over.

Q. Well, have you studied it over enough now to want to say that 74 and 70 do some of the work of pushing the clutch to neutral?

A. 74—no, I wouldn't say that. That clutch 74 is applying the brake and releasing the brake.

Q. Well then, isn't it true and accurate to say that in the drawings of your patent the parts which actually do the work of pushing the clutch into neutral upon a movement of the load lifting means to a predetermined extent in either direction are the parts 67, bell crank 66 and set screw 65, and, if you want, the clutch lever 48?

A. Well, I would not want to say except there may be another number or two short.

Q. Well, maybe you are referring to the cam 69 on the end of the lever 67. That is part of 67, isn't it?

A. Yes, that is right, 67.

Q. And 68 is the pivot of the lever 67, isn't it?

A. Yes.

(Testimony of Carl F. Gerlinger.)

Q. Well then, let's add the parts that I have just mentioned, then, and ask you this: Isn't it a true and correct statement [296] that the parts 65, 66, 67, 68 and 69 are the parts which actually do the work of pushing the clutch into neutral when the load lifting means have reached a predetermined point in either direction, including the clutch lever 48?

A. Well, I want to answer you this question, but I want a little time to study this and to know myself before I may answer that question correctly.

Q. Well, let me ask you this: Do you know what the part 67 in the drawings of your patent is?

A. Yes.

Q. Do you know how it works? A. Yes.

Q. Do you know what the part 66 is?

A. Yes.

Q. Do you know how it works? A. Yes.

Q. Do you know how the part 65 works?

A. Yes.

Q. Do you know how the part 48 works?

A. Yes. But there is more than that to it.

Q. Do you know how the part 76 and the part 74 work? A. Yes.

Q. Well then, what is it that you don't know about this machine which prevents you from answering—— A. Well, I want——

Mr. Fryer: Just a minute. Don't interrupt my question. May I have the question as far as I have gone, please?

(Last question read.)



(Testimony of Carl F. Gerlinger.)

Q. (Continuing) —my question?

A. I don't want to answer that question until I am sure that I have got all the numbers in it.

Q. What is it in the drawings of your patent which confuses you and makes you unable to state what parts, if any, other than 65, [297] 66, 67, 68, and 69 and 48, do the work of pushing the clutch to neutral?

A. Well, offhand, that you have to follow up to make it clear in your mind. I would say that I wouldn't make a statement that I am absolutely right and follow all the numbers out and then answer my questions. Huh?

Q. Did you have anything to do with the making of the invention of this patent?

A. You bet, yes.

Q. Do you know anything about how the machine as a whole works?

A. You bet I do know.

Q. Do you know anything about the reference characters on the drawings?      A. Yes.

Q. And know what they represent?

A. Yes; yes.

Q. Can you point to anything in the drawings of this patent which you do not understand?

A. No, no.

Q. Can you point to anything in the specifications of your patent which you don't understand?

(Testimony of Carl F. Gerlinger.)

A. Well, I wouldn't say. Maybe I don't. No, I understand everything, but offhand talking that way you can get it twisted around and it is not the proper answer, but I want to try to get you—I will try to clear up and not hide anything here.

Q. I merely want to know what you understand about your patent. Now am I correct in understanding, then, that you understand all the drawings and all that is stated in the specifications of your patent so that there is nothing in there which you do not understand; is that right? A. That is right.

Q. All right. Now will you say that it is not true that the parts 65, 66, 67, 68, 69, and part 48, are the parts of your [298] mechanism which do the work of pushing the clutch into neutral position on movement of the load lifting means a predetermined extent in either direction?

A. No, I couldn't answer that question without checking over.

Q. As far as you know that is true; is that right?

A. No, I wouldn't say without checking over.

Q. Well, how long do you have to have to check it over?

A. Well, it will take me about five minutes maybe.

Q. All right; will you do it, please.

The Master: By the way, gentlemen, it is now ten minutes after five.

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: Well, I would very much like to be able to get this five minute interval right here, if I may, your Honor.

The Master: All right; we will wait for that. I had not realized it had gotten that late.

(Pause.)

The Witness: Well, I will tell you, Mr. Fryer, if you want to get this answer right it will take me more than five minutes.

Mr. Fryer: I suspected that. If your Honor please, I would like to see what the witness can learn in five minutes about his own patent here.

The Witness: Well, I can——

Mr. Fryer: So he can find out whether or not he can answer this question and, with your Honor's indulgence, I would ask that we may continue then for at least ten minutes more.

The Master: Take your time and look it over carefully, Mr. Gerlinger, so you can answer the question. In the meantime we will take a recess until he has had an opportunity to look it over.

The Witness: I am ready, your Honor, in roughly checking over. [299]

The Master: All right. Read the question to the witness.

(The last question read was re-read to the witness.)

A. Well, by checking over I find that 48, 63, 64, 65, 66, 67, 69 and 74, 75 and 76 and 77. Now I might not check that very accurately—accurate.

(Testimony of Carl F. Gerlinger.)

A. (By Mr. Fryer) Do you mean by your answer that the parts which you have now enumerated all perform part of the work of pushing the clutch into neutral position when the load lifting means have moved a predetermined extent in either direction?

A. I would say yes, but I wouldn't say that I am accurate without—I just checked over very roughly, see.

Q. In other words, you still are not sure of your answer? Is that it?

A. Well, I say I am not absolutely sure of my answer, why, if I left maybe a figure out of the thing.

Q. Well, how long would it take you to learn this patent of yours well enough to be able to answer definitely as to all of the parts which perform the work of pushing the clutch into neutral whenever the load lifting means have moved a predetermined extent in either direction?

A. Well, to make it clear it would take me a half hour to an hour.

Q. All right. Well, during the adjournment will you devote a half hour or an hour to a study of your own patent here and be prepared to answer that in the morning? A. Yes. Yes. [300]

The Master: Was there a substitution of photostatic copies for Exhibits 16 and 17?



(Testimony of Carl F. Gerlinger.)

Mr. Fryer: Just a moment, Your Honor; I will find that out.

The Master: 15 is page 65 of the issue of October, 1926.

Mr. Fryer: I think not, Your Honor. I think they were merely, so far, marked for identification.

Mr. Aurich: There were two that were not.

Mr. Fryer: Those were all marked for identification, correct.

The Master: You may continue with your cross examination.

Mr. Fryer: May I have Plaintiff's Exhibit 1, please?

Q. (By Mr. Fryer) You have been handed a copy of your patent, Plaintiff's Exhibit 1. You have stated, I believe, that you once built a machine having the parts shown in the drawings of that patent, Plaintiff's Exhibit 1. On or about what date was that machine completed?

A. End of July, 1921.

Q. Where was that machine completed on that date? A. Dallas plant.

Q. Is that the machine which you have previously referred to in your testimony here as your first machine? A. Yes.

Q. Did that first machine, completed in July of 1921, contain an automatic brake? A. No.

Q. Did it contain upper—or did it contain automatic means for moving the clutch to neutral posi-

(Testimony of Carl F. Gerlinger.)

tion on movement of the load-lifting means a pre-determined extent in either direction?

A. Yes.

Q. Did it contain parts having the construction and operation of the parts 90 and 91 on your drawing Exhibit 6 in July of 1921?

A. Bar 67 and 65 and—65.

Q. Have you completed your statement now?

A. Yes. [301]

Mr. Fryer: I move to strike the answer, if Your Honor please, as wholly unrelated to the question, and ask that——

The Master: The motion will be allowed.

Mr. Fryer: I ask to have the question read, please.

(The question was thereupon read.)

A. Not 90 and 91.

Mr. Fryer: What is that answer, please?

(The answer was thereupon read.)

Q. (By Mr. Fryer) That is to say, then, your first machine, completed in July of 1921, did not contain parts having the construction or operation of the parts 90 and 91 shown on Exhibit 6, is that right? A. That is right.

Q. After July of 1921 did you keep the machine which you completed at that time or did you dispose of it?

A. No, I kept the machine and rebuilt it.

Q. Where did you rebuild it?

(Testimony of Carl F. Gerlinger.)

A. In our plant.

Q. In Dallas?                      A. In Dallas.

Q. When did the rebuilding of that first machine become complete?

A. End of September, 1921.

Q. When that first machine was rebuilt in September of 1921 did it become the machine which you have referred to in your previous testimony as your second machine?

The Master: I don't get that question. Read that question.

(The question was thereupon read.)

A. No. It was the first machine.

Q. (By Mr. Fryer) Is it now your testimony that the machine completed in July of 1921 also was your first machine?                      A. Yes.

Q. So in your previous testimony when you referred to your first machine you referred throughout to the machine completed in [302] July of 1921 and the machine rebuilt in September of '21, is that correct?                      A. That is correct.

Q. Now, when this first machine was rebuilt, in September of 1921, did it at that date contain an automatic brake?                      A. Yes.

Q. Did it at that date contain automatic means for moving the clutch to neutral position on movement of the load-lifting means a predetermined extent in either direction?                      A. Yes.

(Testimony of Carl F. Gerlinger.)

Q. Did it at that date contain parts having the construction and operation of the parts 90 and 91 on your Exhibit 6?      A. Not 90 and 91.

Q. That is, the machine as rebuilt and completed in September of 1921 did not contain the parts having the construction and operation of the parts 90 and 91 on Exhibit 6, is that right?

A. That is right.

Q. After this machine was rebuilt in September of 1921 did you keep it or dispose of it?

A. Well, we delivered it to the Willamette Valley Lumber Company at Dallas.

Q. Where was the Willamette Valley Lumber Company of Dallas located at that time?

A. Right at Dallas, Oregon.

Q. How close to the Dallas Machine & Locomotive Works?      A. Right next to us.

Q. And, as a matter of fact, the Dallas Machine & Locomotive Works and the Willamette Valley Lumber Company are all one property in Dallas, aren't they?      A. No.

Q. Aren't they adjoining properties?

A. Adjoining property, yes.

Q. What is the relationship between the Willamette Valley Lumber Company and the Dallas Machine & Locomotive Works as it was in [303] September of 1921?

A. We had no relationship, except the manager and I are cousins.



(Testimony of Carl F. Gerlinger.)

Q. And that condition prevailed in September of '21? A. Yes.

Q. After you delivered the machine completed in September of 1921 to the Willamette Valley Lumber Company do you know what became of the machine after that?

A. The machine stayed in service until the end of 1922. Our Secretary-Treasurer can answer that question better, he got the shop record, what the date——

Q. I am only asking you for your own recollection and I want you to state now whether you personally have any recollection of what happened to this machine rebuilt in September, 1921, after you delivered it to the Willamette Valley Lumber Company? A. It was in operation.

Q. For how long? A. For a year.

Q. And then what happened to it?

A. We rebuilt her.

Q. Where did you rebuild it?

A. At Dallas plant.

Q. When that machine which you took back from the Willamette Valley Lumber Company was rebuilt in your plant did it become the third machine which you have referred to in your previous testimony? A. No. No, no.

Q. When you rebuilt it after taking it back from the Willamette Valley Lumber Company what did you do with it after that rebuilding?

(Testimony of Carl F. Gerlinger.)

A. We changed her into hydraulic.

Q. So that the machine which was rebuilt in September of 1921, after being used for a short time by the Willamette Valley Lumber Company, was taken back by the plaintiff and rebuilt into [304] a hydraulic machine? A. Yes.

Q. Is that correct? A. That is right.

Q. After you completed the rebuilding of this first machine in September of 1921 what machine did you next construct in the nature of a lumber carrier at the Willamette Valley Lumber Company?

The Master: You mean at the Willamette Valley Lumber Company?

Mr. Fryer: I mean at the Dallas Machine & Locomotive Works,—pardon me.

A. At October, first part of October, we started the second machine, and finished the third—finished two of them from October to February 1st, 1922.

Q. Referring, now, to the machine which you say you started in the first part of October of 1921 at the Dallas plant, when was that machine started at that time completed?

A. In September, 1921.

Q. Now, wait a minute. You say you started the design of it in October of 1921, and I am asking you when you completed building it?

A. The first machine?

Q. No, I am speaking about the machine which you say you started to build in October of 1921,

(Testimony of Carl F. Gerlinger.)

after you had rebuilt the first machine in September of 1921.

A. I stated at September finished the machine, end of September, 1921.

Q. Yes, I understand that; and you delivered that machine to the Willamette Valley Lumber Company, didn't you?      A. Yes.

Q. And you later rebuilt that machine into a hydraulic machine, didn't you? [305]

A. Yes, and I——

Q. And then after that you started the construction of another machine?      A. No. No, no.

Q. Oh, you never built another one after that.

A. After I built the first one what went to the Willamette Valley Lumber Company I started the second one in the first of October, and the third one—the two of them was finished by February 1st, 1922.

Q. I understand all that, but you are talking about things I am not asking you about and you are confusing your story. Now, let's go back and start all over again. You have just told us that you first built a machine that you completed in July of 1921.      A. That is it.

Q. Do you remember that?      A. Yes.

Q. And then you rebuilt that machine in September of '21 is that right?

A. I finished it in September, 1921.

(Testimony of Carl F. Gerlinger.)

Q. Yes; and after finishing rebuilding it in September, 1921 you delivered it to the Willamette Valley Lumber Company, is that right?

A. Yes, that is right.

Q. And then you took it back from the Willamette Valley Lumber Company and rebuilt it into a hydraulic machine, is that right?

A. And then——

Q. Now, is that right or wrong?

A. You are right.

Q. (By Mr. Fryer) After that machine was rebuilt into a hydraulic carrier I understand you commenced the construction of still another machine, is that true? The one you say you commenced [306] building in October, of 1921?

A. No, that is not right there. We built—changed it over to hydraulic, end of 1922,——

Q. Yes.

A. —and we built the same as those factory drawings show, 6, in October, 1921, and I stated that we finished two of the same model at February 1st, 1922.

Q. Well, but what I want to know is when did you finish the machine which you started in October of 1921. That one machine, when did you finish it?

A. End of September, 1921.

Q. How could you finish the construction of a machine in September when you commenced building it in October?



(Testimony of Carl F. Gerlinger.)

A. That was the second machine, what I start building in October.

Q. Well, now, let me see if I can help you out on that, Mr. Gerlinger. Do you still have in mind the machine which you took back from the Willamette Valley Lumber Company and rebuilt into a hydraulic machine?

A. Yes, that was a year later.

Q. All right. Well, let's forget that machine entirely, now, and go back to your plant in Dallas, and tell me the first thing that you did after September of 1921 toward building another carrier besides the one which you had rebuilt and delivered to the Willamette Valley Lumber Company?

A. Not besides, no. Model——

Mr. Fryer: Well, I move to strike that answer as not responsive to the question at all, Your Honor.

The Master: I think it is responsive, but I doubt very much whether you and the witness understand each other.

Mr. Geisler: That is the trouble.

Mr. Fryer: Well, may I have that question read, I think it is entirely proper.

The Master: The question was entirely proper. Now, listen very carefully to the question, Mr. Gerlinger. [307]

A. Yes.

Mr. Geisler: May I not suggest, Your Honor, for the purpose of expediting things, that these ma-

(Testimony of Carl F. Gerlinger.)

chines be referred to as number 2 and number 3, instead of always omitting purposely that designation?

The Master: Well, I can't control the form of the questions that counsel asks. The question is perfectly clear. In your judgment and mine it might be better to use them by number, but counsel is entirely within his rights.

(The question referred to was thereupon read.)

A. We built the second machine, started the second and third machine of the same model, at 1921, first part of October.

Q. (By Mr. Fryer) You commenced the construction of what you call the second machine in the first part of October? A. Yes.

Q. Is that your testimony?

A. Which our shop records will show.

Q. All right. Now, when did you complete the construction of that machine which you call the second machine, which you commenced in the first part of October of 1921?

A. I finished about—the two machines——

Q. I am not asking you about two.

The Master: Mr. Gerlinger, he is talking about the second machine. When did you finish the second machine. Don't pay any attention to the third machine.

A. Well, Your Honor, I built the two together.

(Testimony of Carl F. Gerlinger.)

The Master: That doesn't make a particle of difference. Just tell him when you finished the second.     A. February 1st, 1922.

Q. (By Mr. Fryer) Now, did that machine which you call the second machine, completed on February 1st, 1922, contain an automatic brake?

A. Yes. [308]

Q. Did it contain the part corresponding to the part 67 of your patent in suit for moving the clutch to neutral upon movement of the load in the machine a predetermined extent in one direction?

A. I would like to——

The Master: Read the question.

A. Read the question.

(The question was thereupon read.)

A. No. It was in lowering it and hoisting it, in both directions.

Q. (By Mr. Fryer) Did the machine which you completed in February of 1922, and which you refer to as your second machine, contain a bar like the bar 67 shown in the drawings of your patent?

A. Yes.

Q. Did that bar operate to move the clutch to neutral position when the load pushed that bar upwardly?     A. Yes.

Q. Did the machine which you completed in February of 1922, and which you call your second machine, contain the parts like 90 and 91 shown on your drawing Exhibit 6?     A. Yes.

(Testimony of Carl F. Gerlinger.)

Q. Now, you have referred to another machine as your third machine. Was that one built along with and at the same time as your second machine?

A. Yes, that was built along with the second machine.

Q. So that commencing in October and ending in February of 1922 you built two machines, which you have called your second and third machines, is that right?      A. Read that question again.

(The question was thereupon read.)

Mr. Fryer: I will correct that question to say October of 1921, if Your Honor please.

A. We built the three machines.

Q. (By Mr. Fryer) All right. Now, let's go back to what you call your second machine. Am I right in understanding that [309] you commenced building that machine in October of 1921?

A. What was this question?

(The question was thereupon read.)

A. In October, 1921 we started building the second machine, yes.

Q. (By Mr. Fryer) And that second machine was completed in February of 1922?      A. Yes.

Q. Did you commence building the third machine which you have referred to in October of 1921?      A. Yes.

Q. And did you complete that third machine in February of 1922?      A. Yes.



(Testimony of Carl F. Gerlinger.)

Q. All right. Now, with respect to the third machine, as you describe it, completed in February of 1922, did it contain parts having the construction and operation of the parts 90 on your drawing Exhibit 6—90 and 91?      A. Yes.

Q. Did it also contain a part like the part marked 67 on the drawings of your patent in suit?

A. Yes.

Q. Did it also contain an automatic brake?

A. Yes.

Q. After completing what you call your second and third machines, in October—in February of 1922, did you keep those two machines, or did you dispose of them?      A. We disposed of them.

Q. Did either of them come back into your possession at any time subsequently?      A. No.

Q. After completing your third machine, in February of 1922, did you build any more lumber carriers?      A. Yes.

Q. What was the first lumber carrier which you built after February of 1922?

A. The fourth one, the same model. [310]

Q. The fourth one was the next one?

A. February—about February, 19—1922.

Q. Did that fourth machine, commenced in February, 1922, when completed contain parts having the construction and operation of the parts 90 and 91 on Exhibit 6?      A. Yes.

Q. Did it also contain a part corresponding to the bar 67 of your patent in suit?      A. Yes.

(Testimony of Carl F. Gerlinger.)

Q. Now, I understand that after completing your fourth machine—strike that, if you please, Your Honor. When was this fourth machine, which you started in February of 1922, completed?

A. About April.

The Master: Of what year? A. 1922.

Q. (By Mr. Fryer) Am I correct in understanding that after completing the fourth machine, in 1922, you constructed and completed six more machines having substantially the same construction and operation as your fourth machine?

A. That is right.

Q. All right; and those six additional machines contained parts substantially identical in construction and operation with the parts 90 and 91 on Exhibit 6, is that right? A. Yes.

Q. And each one of those additional six machines contained a part having the construction and operation of the part 67 of your patent in suit, is that true? A. Yes, that is true.

Q. After you completed the last of those six additional machines you did not thereafter build any further machine containing a part having the construction and operation of the part 67 of your patent in suit, did you?

A. Read that question back, please. [311]

(The question was thereupon read.)

A. No.

Q. Every one of the ten machines which we have now referred to, which contained a part having the

(Testimony of Carl F. Gerlinger.)

construction and operation of the part 67 of your patent in suit, also contained parts having the construction and operation of 90 and 91 on your Exhibit 6 except the first machine, is that right?

A. That is right.

Q. So that the first machine which you built is the only machine which you ever built which had only the part corresponding to 67 of your patent in suit to stop upward movement of the load-lifting means when it reached a predetermined point, is that true?

A. Yes.

Mr. Fryer: What is the answer, please?

(The answer was thereupon read.)

Q. (By Mr. Fryer) You have stated in your previous testimony, "I was the first to think of and to manufacture a carrier with a positive lift and automatic feature where automatic stop moved clutch in neutral position and applied the brake." By that answer did you mean that you produced a machine having those features before somebody else did?

A. Absolutely.

Q. Before whom else? Everyone, you mean?

A. In a lumber carrier, yes.

Q. In other words, by that answer you mean to inform the Court that no one else before you had ever produced a machine having those automatic features, is that right?

A. Not to my knowledge.

Q. And, also, you said in your previous testimony, "I was the first with a positive,—first to

(Testimony of Carl F. Gerlinger.)

think of and to manufacture with a positive lift with an automatic feature." You mean to [312] say that you were the first person who ever built a machine containing those features, is that right?

A. A lumber carrier.

Q. What do you mean by lumber carrier?

A. A carrier, straddle truck, what——

Q. Do those machines carry lumber only?

A. No.

Q. They carry all sorts of industrial products, do they? A. Yes, but they should——

Mr. Fryer: May I have that answer, please?

(The answer was thereupon read.)

Q. (By Mr. Fryer) Now, when you commenced the construction of what you call your second machine and put into it parts having the construction of parts 90 and 91 on your Exhibit 6, what was your reason for putting those parts in that machine?

A. To put—the reason for that was that if you raise the shoe without a load, that the automatic—that you would automatically cut it without the load, and it was——

Q. In other words—go ahead.

A. —and it was only duplication from the top.

Q. In other words, your purpose in putting the parts 90 and 91 in your second machine in addition to the part 67 was to fix the machine so that the load-lifting means would stop on reaching a predetermined point in an upward direction, irrespec-



(Testimony of Carl F. Gerlinger.)

tive of whether the machine had any load in it or not, is that right?      A. That is right.

Q. The machine would not do that without parts 90 or 91, would it?      A. Not without the load.

Q. Do I correctly understand your testimony to be that you first learned of the construction of the Willamette-Hyster's machine in September of 1935?

[313]

A. Get that question again. I didn't——

(The question was thereupon read.)

A. No.

Q. When did you first learn of the construction of the defendant Willamette-Hyster's machine?

A. About 19—about 1926, '27.

Q. How did you come to find that out in that year, 1926 or '27?

A. Well, through the advertising, or through the people and machine what they sold.

Q. You are referring now to advertisements put out by the defendant Willamette-Hyster Company, or the Willamette-Ersted Company?

A. Willamette-Ersted — no, the Willamette-Ersted—it was The Willamette Iron Works, Willamette Iron & Steel Works.

Q. The first advertisements which you saw, then, were advertisements put out by the Willamette Iron & Steel Company advertising the construction of the Willamette-Hyster's machine, is that right?

A. I don't get that, please.

(The question was thereupon read.)

(Testimony of Carl F. Gerlinger.)

A. I wouldn't say the Willamette-Hyster machine. At that time it was Willamette Iron & Steel.

Q. That was the name of the company at that time, as you understand it? A. Yes.

Q. There was no difference in the construction of the machine, though, advertised at that time and the construction of the machine as you know it at this time, was there?

A. Well, I couldn't say that, and I didn't inspect any.

Q. You didn't inspect any Willamette Iron & Steel machines in 1926 when you saw the advertisements of that machine, did you? A. No. [314]

Q. Was the Willamette Iron & Steel machine sold in competition with yours in 1926?

A. Yes.

Q. It was sold in and around Portland, Oregon?

A. Yes.

Mr. Fryer: May I have that question and answer read, if Your Honor please?

(The question and the answer thereto were thereupon read.)

Q. Knowing that the Willamette Iron & Steel Company was making a lumber carrier and selling it in competition with yours in and around Portland, you did not make any efforts to see what that machine was like, as far as its construction was concerned? A. No.

Q. Did anyone in your company pay any attention to how this competing Willamette Iron & Steel machine was built at that time?

(Testimony of Carl F. Gerlinger.)

A. Not that I know of.

Q. In other words, the Willamette Iron & Steel Company came on the market with a competing machine, and, so far as you know, neither you nor anyone in your company made any effort whatsoever to see what the construction of that machine was like; that is true, is it?

A. That is true, yes.

Q. You just let them sell this machine in competition with yours and paid no attention to it whatever, is that correct?

A. No, except in advertising what we saw; no more than that.

Q. Do you remember now whether or not the Willamette Iron & Steel's advertising literature which you saw in 1926 or '27 advertised the automatic stops and brakes contained in that machine?

A. No.

Q. You don't remember whether it said that or not?

A. No.

Q. Are you prepared to say that that advertising did not emphasize those features in the Willamette Iron & Steel Company's machine at that time?

A. I don't—I couldn't say that.

Q. As far as you know, those advertisements may have explained the construction and operation of the Willamette Iron & Steel machine's automatic stops and automatic brake, is that true?

The Witness: Did I answer that question?

(The question was thereupon read.)

(Testimony of Carl F. Gerlinger.)

A. No.

Q. (By Mr. Fryer): When you looked at a Willamette-Hyster machine, as you have stated you did in or about September of 1935, where did you find that machine to look at it in that way?

A. At Forest Grove.

Q. In Oregon? A. Yes.

Q. Did you have any trouble or difficulty in looking at that machine? A. Not at all.

Q. That was not a difficult thing to do with respect to one of the defendant's machines in the field, was it? A. What was that question?

(The question was thereupon read.)

A. No. I went for that purpose.

Q. Was that machine out in the open, or was it at somebody's plant, when you saw it in September of 1935?

A. It was at a lumber company's plant.

Q. Now, is it your understanding— What lumber company, by the way? A. Miller.

Q. The Miller Lumber Company, is that the name?

A. No—well, I couldn't tell you the name of it.

Q. Is it your understanding that the machine which you saw at [316] the Miller Lumber Company, if that is the name of the place, was the first machine made by Willamette-Hyster Company or its predecessors containing the construction which you say comes within claim 4 of your patent?

A. Give me that question again, please.



(Testimony of Carl F. Gerlinger.)

The Master: Read the question. I don't quite get it myself.

(The question was thereupon read.)

A. I couldn't say that. That is the first machine I saw.

Q. And, as far as you know, that is the first machine ever made by Willamette-Hyster Company containing construction which you believe comes within claim 4 of your patent, is that right?

A. Read that question.

(The question was thereupon read.)

A. So far as I know. I mean that is the first one I saw.

Q. And I guess it is also the fact that, as far as you know, the Willamette-Hyster Company never tried to sell a carrier to any of your customers prior to September of 1935, is that right?

A. Oh, no. No. That is not the fact. They sold carriers to our customers.

Q. Had you never heard of any efforts on the part of Mr. Grab, working for the Willamette Iron & Steel Company, to sell Willamette Iron & Steel carriers to your customers prior to 1935?

A. Yes. Yes.

Q. And I suppose you never paid any attention to the fact that Mr. Grab, of Willamette Iron & Steel Company, was trying to sell carriers to some of your customers? [317]

A. Yes, I paid attention. We tried to get the order if we could.

(Testimony of Carl F. Gerlinger.)

Q. You never concerned yourself with what kind of a machine Mr. Grab was trying to sell to your customer, did you?      A. No, no.

Q. You didn't know whether the machine that he was trying to sell to your customers contained features which you considered yours or not, did you?      A. No.

Q. In other words, you were perfectly happy to have Mr. Grab to sell to your customers a machine containing features which you considered to be your own and didn't make any investigation to find out whether he was doing that or not, is that true?

A. It was not my business. I didn't think I would go around and look at what features are all on the machine.

Q. Well, were the fact recited in my question true at that time?

A. What was that question, please?

(The question referred to was thereupon read.)

A. I didn't make any investigation, that is true.

Q. Now, this machine which you looked at in September of 1935 at Forest Grove, in Oregon, that machine was at a place called the Forest Grove Lumber Company, wasn't it?

A. I couldn't say. All what I know is the manager's name, Miller.

Q. And Mr. Miller is the manager for the lumber company where you inspected the machine in September of 1935?      A. Yes.

(Testimony of Carl F. Gerlinger.)

Q. Have you ever sold carriers to that concern managed by Mr. Miller at Forest Grove?

A. No.

Q. Have you ever tried to?

A. Not personally, no.

Q. Someone in your organization has tried to do so?      A. I don't remember. [318]

Q. Can you name any one of your customers that you have referred to to whom Mr. Grab tried to sell carriers?

A. Sold to Shevlin-Hixon at Bend, Oregon, two.

Q. And when was that?      A. 1935.

Q. Now, do you know of any other customer of the Dallas Machine & Locomotive Works to which Mr. Grab tried to sell lumber carriers at any time between 1926 and 1935?

A. Yes, Glendale Lumber Company.

A. Yes, at Glendale, Oregon.

Mr. Fryer: May I have that answer, Mr. Reporter, please?

(The answer was thereupon read.)

Q. Was that the Glendale Lumber Company at Glendale, Oregon?

A. Well, I wouldn't say sure if that is the lumber company's name.

Q. When did you find Mr. Grab attempting to sell a lumber carrier to that customer of yours at Glendale, Oregon?

A. About two or three years ago.

Q. Two or three years ago?

(Testimony of Carl F. Gerlinger.)

A. Yes, about.

Q. Is that the first occasion that you can now recall on which Mr. Grab ever attempted to sell any carrier to any customer of yours in competition with your machine?

A. Well, I have to do a little thinking.

Q. Well, will you please do that thinking and then answer the question.

A. Medford, Oregon.

Q. And on or about what date did Mr. Grab attempt to sell a competing carrier to one of your customers at Medford, Oregon?

A. I don't know what year.

Q. However, it was before the attempt to sell one to the company at Glendale, Oregon, is that your recollection?

A. Yes. [319]

Q. How long before?

A. I couldn't say how much before.

Q. A year or two?

A. I couldn't say that. I might be off a year or two.

Q. Do you remember the name of the concern at Medford, Oregon?

A. Owens-Oregon.

Q. How do you spell that, please?

A. Owens Lumber Company.

The Master: O-w-e-n-s hyphen Oregon.

Q. (By Mr. Fryer): Now, what if anything did you do when you found out that Mr. Grab was attempting to sell a competing carrier to the Owens-Oregon Lumber Company at Medford, Oregon?

A. Didn't do anything.



(Testimony of Carl F. Gerlinger.)

Q. You didn't concern yourself about whether or not the machine he was trying to sell to your customer contained features which you considered to be yours or not, did you? A. No.

Q. If Mr. Grab was doing that, that was something that you were perfectly satisfied to have him do?

A. Oh, no. I wouldn't be satisfied if I would have knowed it.

Q. It would have been something that you would have objected to very strenuously had you known about it, is that right? A. You bet!

Q. And yet you took no steps to find out whether or not this machine contained any features which you considered yours; is that also true?

A. Yes, that is true.

Q. (By Mr. Fryer): Did you ever supply for your attorney, Mr. Geisler, any circulars of the Willamette-Ersted Company showing the construction of the machine which you considered to be an infringement in this suit? A. Yes.

Q. Did you supply to Mr. Geisler the Willamette-Ersted Company's [320] circular which he attached to the bill of particulars filed in behalf of your company in this case?

A. Please state that again.

(The question was thereupon read.)

Mr. Geisler: I might say that is called "Service Manual" in the bill of particulars, so we will know what you are talking about.

(Testimony of Carl F. Gerlinger.)

The Master: That is what you refer to?

Mr. Fryer: Yes, Your Honor.

A. I did not. Mr. Waters, our general superintendent.

Q. (By Mr. Fryer): That Service Manual, which was entitled "Willamette-Ersted Company", did not carry the name "Willamette-Hyster" on it anywheres to your recollection, did it?

A. I don't remember.

Q. It is your understanding that Willamette-Ersted was the name of Willamette-Hyster Company before it was changed to Willamette-Hyster, is that right?      A. That is right.

Q. Do you know where Mr. Waters obtained this Willamette-Ersted Service Manual which was handed to your attorney, Mr. Geisler?

A. What was that question, please?

The Master: Do you know where Waters got that manual?      A. No.

Q. (By Mr. Fryer): Do you know when he got it?      A. Sometime in September, 1935.

Q. Do you remember how long it has been since the defendant has been called the Willamette-Ersted Company?      A. I don't remember.

Mr. Fryer: May the witness be shown Plaintiff's Exhibits 9, 10, and 11, if the Court please?

The Master: Certainly. You are about to go into another phase of the matter, are you?

Mr. Fryer: Yes, sir.

(Testimony of Carl F. Gerlinger.)

The Master: Well, the change of reporters is coming now and we will take a recess for five minutes. [321]

(A short recess was then had.)

Q. (By Mr. Fryer): I show you the drawing, Plaintiff's Exhibit 9, ask you to examine it and state whether or not you find in the construction represented on that exhibit parts having the construction or operation of the parts 90 and 91 on your Exhibit 6? A. 90 and 91 isn't on here.

Q. I now show you the drawing Plaintiff's Exhibit 10, ask you to examine that drawing and state whether or not the construction represented on that drawing contains any parts having the construction and operation of the parts 90 and 91 of your Exhibit 6? A. No, not on—90 and 91.

Q. The structure shown on Exhibit 10, then, does not contain parts having the construction and operation of 90 and 91 on Exhibit 6?

A. Not on this drawing.

Q. That drawing you have in your hand is Exhibit 10; is that right? Look at the back of it.

A. Exhibit 11.

Q. Eleven? A. Isn't it?

Mr. Fryer: I have got Exhibit 11 here.

The Master: Maybe I misnumbered them. The proper numbering is on the front.

Mr. Fryer: I have 11 in my hand, your Honor, and the bailiff has one which has 10 on the front of it.

(Testimony of Carl F. Gerlinger.)

The Master: Yes. That is wrong on the back.

The Witness: Yes.

Q. (By Mr. Fryer): The paper you now hold is Exhibit 10? A. That is right.

Q. And you do not find on Exhibit 10 any construction substantially identical in construction and operation with the parts 90 and 91 on your Exhibit 6; is that right?

A. There is nothing on like 90 and 91, no. [322]

Q. Now will you look at the drawing Plaintiff's Exhibit 11 and state whether or not the mechanism shown thereon contains any parts having the construction and operation of the parts 90 and 91 of your Exhibit 6? A. No.

Q. That mechanism also, then, is a mechanism which operates without having in it any parts like the parts 90 and 91 of Exhibit 6; is that your understanding?

The Witness: Give me that question, please.

(Last question read.)

A. That don't have any 90 or 91, no.

Q. 90 or 91. That is what I meant to say. The drawings 9, 10 and 11, as I understand your testimony, were made by someone for you?

A. Yes; Mr. Wetteland.

Q. And Mr. Wetteland was acting under your directions when he made those drawings?

A. Yes, sir.

Q. Did you supply Mr. Wetteland with any preliminary sketches or drawings for him to follow in making either exhibit 9 or 10 or 11?



(Testimony of Carl F. Gerlinger.)

A. Yes, I did.

Q. Have you got those sketches now?

A. No.

Q. Do you remember what they were like?

A. It was the same as this drawing shows.

Q. The sketches which you supplied to Mr. Wetteland were sketches showing the same construction as appears on Exhibits 9, 10 and 11?

A. Yes.

Q. Who made those sketches?

A. I did.

Q. When did you make them?

A. At the early part, May and June. [323]

Q. Of what year?           A. 1921.

Q. Were those sketches as complete in every respect as the drawings which appear on Exhibits 9, 10 and 11?

A. I wouldn't say—I didn't make any complete working drawings. I had a man up in Dallas make them for me.

Q. What was the man's name up in Dallas you refer to?           A. Name of Benton.

Q. How do you spell that?

A. B-e-n-t-e—t-e-n.

Q. B-e-n-t-e?           A. t-t-e-e-n.

Q. t-t-e-n?           A. Yes; and Mr. Parish.

Q. Mr. Parish and Mr. Benton then made the sketches which you used to instruct Mr. Wetteland how to make Exhibits 9, 10 and 11?

(Testimony of Carl F. Gerlinger.)

A. No, I made the sketches and they made some part of drawings as I instructed them.

Q. What happened to the drawings which they made? A. I furnished it to Mr. Wetteland.

Q. Do you know what he did with the drawings made by Parish and Benton? A. No.

Q. Now do you remember what the sketches were like which you supplied to Mr. Parish and Mr. Benton to prepare these drawings from?

A. As you see on this drawing.

Q. They were the same as Exhibits 9, 10 and 11 in every respect?

A. In every respect, yes. That is right.

Q. Were they on the same scale?

A. Well, they was working drawings. [324]

Q. Were they the same size as Exhibits 9, 10 and 11, the sketches which you gave to Parish?

A. I wouldn't say that.

Q. What would you say as to their sizes?

A. Well, I would say about the half size. [325]

Q. Except for the fact then that they were only half the size of Exhibits 9, 10 and 11, these original sketches which you made were in every respect the same as the drawings Exhibits 9, 10 and 11; is that true?

A. I didn't make a complete—as I stated, I didn't make any complete in detail like they are.

Q. Did these sketches which you say you made show all of the parts which you show on Exhibits 9, 10 and 11?

(Testimony of Carl F. Gerlinger.)

A. Yes, the principal. But, as I stated before, I didn't make any complete working drawings.

Q. I didn't ask you about working drawings. I am asking you about the subject matter of 9, 10 and 11, and I would like you to state now whether the sketches which you gave to Mr. Parish and Mr. Benton to make drawings from were half size reproductions of the drawings Exhibits 9, 10 and 11.

The Witness: Give me that question again, please.

(Last question read.)

A. I will say yes, about.

Q. And those sketches, if I understand you correctly, showed all of the parts which are shown on the drawings Exhibits 9, 10 and 11; is that true?

A. I wouldn't say that.

Q. Will the bailiff please give the witness Plaintiff's Exhibit 2, the patent in suit. In lines 10 and 11 of page 3 of the specification of your patent, Exhibit 2, reference is made to "a spring mounted to yield if too great a strain is applied to the load lifting means". Is the mechanism there referred to shown in the drawings of Exhibit 2?

A. What——

The Master: What lines are you referring to counsel?

Mr. Fryer: Lines 10 and 11 on page 3 of the specification.

Mr. Geisler: You refer to the claim? Is that the idea? [326]

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: I refer to lines 10 and 11 of page 3 of the patent.

Mr. Geisler: Yes. It is not of the specifications; of the claim.

The Witness: Oh. Now I find it. What was that question, please?

Mr. Fryer: Read the question, please.

(Last question read.)

A. Yes.

Q. What number or numbers is or are applied to that mechanism in the drawings of Exhibit 2?

A. Figure 2 have you reference to? What is that question?

Q. I want you to state what numbers in the drawings of your patent, Exhibit 2, are applied to the part which you just stated is shown in those drawings, that part being a spring mounted to yield if too great a strain is applied to the load lifting means.

A. Figure 4—Figure 5 shows it.

Q. What is the number of the part, please?

A. 78, 80—78, 79, 80 and 82—and 81 and 82.

Q. The mechanism last referred to by you in the drawings of Exhibit 2, which you state comprises the parts 78, 79, 80 and 82, functions only whenever the device is overloaded beyond the point of safety; is that your understanding?

A. That is right.

Q. That is the explanation of that mechanism given in the specification at lines 63, '4 and '5 of page 2, where the patent says, "Whenever the de-



(Testimony of Carl F. Gerlinger.)

vice is overloaded beyond the point of safety, the springs will permit the clutch to slide on its shaft"; is that your understanding?   A. On what page?

Mr. Fryer: On page 2, Mr. Gerlinger, lines 63, 64 and 65.

The Witness: What was that question, please?

(Last question read.) [327]

The Witness: (After a pause) Now give me that question.

(Last question re-read.)

A. Yes.

Q. And the point of safety at which this mechanism which you have just described is set, is one and one half tons more than the machine is supposed to carry; is that right?   A. That is right.

Q. (By Mr. Fryer): Can you give us a detailed explanation of how the mechanism which you have just described, comprising the parts 78, 79, 80 and 82, work when the machine is overloaded a ton and a half beyond its capacity and this safety device goes into operation?

Mr. Geisler: If your Honor please, all this goes into claim 5, on which we are not suing. It is immaterial. If your Honor wishes to hear it I—

The Master: What do you claim for the materiality of it?

Mr. Fryer: If counsel is prepared to concede that this mechanism which I am now examining the witness about is completely foreign to the case and is not going to be relied upon by them for any pur-

(Testimony of Carl F. Gerlinger.)

pose in the case, then I think I can withdraw my cross examination with respect to it.

Mr. Geisler: We are suing only on claim 4. It is not a part of claim 4.

Mr. Fryer: And it is your position, Mr. Geisler, that the mechanism just referred to by the witness does not constitute any part of the combination of claim 4?

Mr. Geisler: Correct.

Mr. Fryer: Very well. Then we withdraw the question.

Q. Will you look at your patent in suit, Plaintiff's Exhibit 2, at the point where the reference character 69 is applied in Figure 2 of the drawing. Do you see Figure 2 of the drawings of [328] your patent now? A. Yes.

Q. That is a plan view of your machine?

A. Of what figure?

Q. Figure 2. A. Yes.

Q. The part marked 69 in Figure 2 is also shown in plan view; is that your understanding?

A. I didn't get that, please.

(Last question read.)

Q. Do you know what a plan view is, Mr. Gerlinger?

A. Yes. Yes, that is shown at——

Q. Well, is the part 69 shown in plan view on Figure 2? A. On the side view?

Q. Does Figure 2 show a side view of 69?

A. No. That shows looking at the top. My mind don't work.

(Testimony of Carl F. Gerlinger.)

Q. All right. Then in Figure 2 we are looking down on the top of your machine; is that your understanding? A. Yes.

Q. We are also looking down on the top of the part 69 shown in that Figure 2; is that right?

A. 69, yes.

Q. Now what part of the machine or of 69 is that structure shown in double lines making a U-shape around the end of the lead line extending downwardly from the figure 69? A. Yes.

Q. I say, what is that structure?

A. That is bar 67.

Q. That is all part of the bar 67; is that your understanding?

A. 69 is not a—69 is part of 48.

Q. You mean by that it is integral, moves with 48? A. It is a cam there, yes.

Q. 69 then is a cam on the bar 48; is that right?

[329]

A. 48; that is right.

Q. And what is that U-shaped piece which is shown surrounding the end of the lead line extending downwardly from 69? Is that also a part of 48?

A. No. That is shown—that is 67. You mean the dotted line?

Q. No; I mean the solid line, two lines parallel to each other and forming an inverted U around the end of the lead line extending down from the figure 69. Is that a part of 48 or a part of 69?

A. You mean the——

(Testimony of Carl F. Gerlinger.)

The Master: I don't know whether he understands what you mean by the lead line.

Mr. Fryer: May I go up and show it to the witness, your Honor?

The Master: Yes, if you will be so good, Mr. Fryer. I think if you used the large scale drawings perhaps it would be a little more easily understood.

Mr. Geisler: We have one right here.

The Master: Well, We have one right here. That would show it better, would it not?

Mr. Fryer: I think that would be confusing. It is colored here. We had better refer to the original drawing.

The Witness: This line, you mean (indicating)?

Q. (By Mr. Fryer): Can you see the two parallel lines which I am now pointing to, forming an inverted U surrounding the end of the lead line extending downwardly from the figure 69?

A. This line what you see is lever 67.

Q. You have pointed to a dotted line?

A. Yes.

Q. Whereas I have been pointing to a solid line——

A. And this——

Q. Just a minute: pointing to a solid line which is not dotted, and on the drawings of the patent is only about an eighth of an inch long, making a figure looking like an inverted U at the end of the line 69. [330]

A. No that is a wedge.

Q. That is a what? A. A wedge or a cam.

Q. A wedge? A. A wedge or a cam.

Q. And is that wedge or cam formed on the part



(Testimony of Carl F. Gerlinger.)

48 or on the part 69? A. No; on part 48.

The Master: You mean 69?

Mr. Fryer: Yes, your Honor.

Q. That wedge member or cam member represented by these lines in a U-shape are a part of the lever 48, then; is that correct? A. Yes.

Q. And do they surround the upper end of the part 69 which appears in Figure 2?

A. That is—I mean, Figure 1 shows you more plainly.

Q. I know, but I want to understand Figure 2 and I would like you to state whether or not this wedge construction which you say is a part of 48 surrounds the upper end of 69, which we see in plan on Figure 2 of the drawings?

A. I don't see it. I don't see it. I only see the cam on Figure 2.

Q. Well, will you color with a red pencil, which I will now hand you, everything in Figure 2 which you say is a cam forming a part of the lever 48. May I hold this for you?

(Witness marks as requested.)

Q. Everything which you have now colored in red in Figure 2 of your patent is the cam or wedge formed on the lever 48 of your patent; is that right?

A. Yes.

Q. Is it your understanding that that cam or wedge is designated by the reference character 69?

A. 69; that is a cam, and 69 is the bar 67 with an extended arm, would hit the wedge on the side of 48. [331]

(Testimony of Carl F. Gerlinger.)

Q. Is it then your understanding that the part 69 is wholly different from the thing which you have colored red on Figure 2 of the drawings of the patent?

The Witness: I would like to get that question again, please.

(Last question read.)

A. Well, this don't show plain. It shows more plainer on Figure—I mean on Figure 1. 69 is part of 67.

Q. After seeing it more plainly in Figure 1, as you have stated, will you state now whether or not the part on Figure 2, which you have colored red, is the part 69, or whether it is a part other than 69?

A. 69 makes contact against that lever.

Mr. Fryer: May I have that answer, please.

(Last answer read.)

Q. I was asking you about the part which you have colored red in Figure 2 of your patent, and I would like you to tell the Court whether that part colored red is what you understand to be 69, which you have referred to as better shown in Figure 1.

A. As I—

Mr. Geisler: Just a minute. I will make an objection, your Honor. It strikes me we are taking a lot of time about the drawings when the patent speaks for itself. No matter what the understanding of the witness is, his own specifications and his own drawings tell what it is.

Mr. Fryer: Our point, your Honor, is that the drawing is ambiguous and we are trying to find out

(Testimony of Carl F. Gerlinger.)

how this thing works that we are accused of having taken from this plaintiff, and no one can tell us better than the man himself who created the thing.

Mr. Geisler: In response to that I beg to say this, your Honor; it is understood that all patent drawings are directed to men who are versed in the art. They are not finished drawings. In most every case I have had any experience with, those drawings, if they are to be converted into a machine, have to [332] be taken into a drafting room and drawings made first. It is supposed that the person familiar with the art of reading those drawings knows what to do with them.

Mr. Fryer: Of course we concede that, your Honor, and granting all the latitude we can to a skilled mechanic in reading those drawings we still are unable to understand how the thing works, and unable to understand what we are accused of appropriating. This is the heart of the thing and we are trying to find out how the thing works from the man who made it. I think we are entitled to get this information.

The Master: I think you are entitled to find out how he claims 69, 67 and 48 work. I am going to suggest to counsel, however, perhaps you might be able to find it out more readily if you would ask him that direct question.

Mr. Fryer: Well, I will try it. I have my fears, but I will start it.

The Witness: Well——

(Testimony of Carl F. Gerlinger.)

Mr. Fryer: May I have the last question and answer, please?

(The last question was read as follows: "I was asking you about the part which you have colored red in Figure 2 of your patent, and I would like you to tell the Court whether that part colored red is what you understand to be 69, which you have referred to as better shown in Figure 1.")

A. 69 makes a contact on lever 48.

Q. What is the shape of the part 69 which contacts the lever 48?

A. It is a wedge shape, or a wedge shape.

Q. All right. Now looking at Figure 2 of your patent in suit, will you explain how the part 67 and the part 69 work to operate the lever 48, if they do that?

A. When bar 67 raises up 69 will make contact on that wedge and 68 is pivot and will move clutch in neutral position, move that 48 lever, disengage the clutch. [333]

Q. In your last answer you said would make contact with the wedge. What is that wedge in Figure 2?

A. On the side of the lever. It don't show so very plainly.

Q. There is a wedge on the lever 48 which is not shown in the drawings; is that your answer?

A. It is shown but it don't show very plainly.

Q. And you understand that the bar 67 engages that wedge?

A. Yes.



(Testimony of Carl F. Gerlinger.)

Q. In order to move 48? A. Yes.

The Master: Would I disturb your thought if I ask a question here?

Mr. Fryer: Yes; certainly.

The Master: Is that wedge on bar 48 shown any place on Figure 1?

Mr. Fryer: That was a question to the witness, your Honor?

The Master: Yes.

A. It is blocked in there.

The Master: Immediately to the right of the lower end of the pedal 37?

A. It is right above 68.

The Master: Is that what you mean, the portion marked in there that is blocked in, you say?

A. Yes.

Mr. Fryer: I am afraid, your Honor, you may be confused there. That rectangular bar is an end of the rack bar 21.

The Master: That is what I am trying to find out, whether it is shown any place.

Mr. Fryer: I think I can clear this up now, your Honor.

The Master: All right.

Q. (By Mr. Fryer): Looking at Figure 1, when the bar 67 is moved upwardly does the cam 69, which appears in Figure 1, move to the left of the drawing or toward the left of the drawing?

A. Move that way (indicating). [334]

Q. That is, it moves toward the motor end of the machine shown in Figure 1? A. Yes.

(Testimony of Carl F. Gerlinger.)

Q. Is it that movement of the part 69 toward the motor end of the machine which moves the lever 48—— A. Yes.

Q. Or is it the upward movement of 69 which moves the lever 48?

A. Well, it is the upper—no; it is the upward movement of bar 67.

Q. Yes; and the cam 69 moves toward the motor end of the machine when 67 moves up; is that right?

A. The cam, the wedge shoves the lever over.

Q. When you say shoves it over, it shoves it towards the top or the bottom of the machine shown in Figure 2? A. Toward the engine.

Q. Toward the engine in the machine as shown in Figure 2? A. Yes.

Q. So, then, summarizing the operation of 67, is it your understanding that when the load hits 67 and moves it upwardly, the parts shown in Figure 2 are such that the end of the cam 69 moves upwardly? A. No; it is sideways.

Q. And pushes the bar 48 over toward the engine? A. Yes.

Q. Or toward the bottom of the figure in Figure 2? A. Yes.

Q. Now is that cam 69 arranged to push the lever 48 toward the engine shown in the model, Exhibit 13 for identification?

A. This is changed (indicating).

Q. When you say "this" you point to the lever overlaying the part marked 67?

(Testimony of Carl F. Gerlinger.)

A. Yes; this is changed. This lever is operated with this set screw; 67 raises against 70 and moves in neutral position. [335]

The Master: Moves 70 into neutral position?

A. Yes.

Q. (By Mr. Fryer): The cam 69 of the patent is not on the model, 13 for identification?

A. No, no.

Q. Do you know the defendant in this case, the Clark & Wilson Lumber Company, of Portland, Oregon? A. Yes.

Q. In fact, you sold the defendant Clark & Wilson Lumber Company two of your hydraulic carriers in 1923, did you?

A. Mr. Fryer, I wouldn't say 1923. I don't remember if it is, but it is about that time.

Q. You or your company, the plaintiff here, did sell Clark & Wilson Lumber Company two of your hydraulic carriers, though, did they? A. Yes.

Q. And as nearly as you can recall, that was about in the year 1923 or '24?

A. I would say about. Well, about '23 or '24.

Q. Where did those two hydraulic carriers go that you sold to Clark & Wilson Lumber Company? To their plant here in Portland?

A. At Linnton.

Q. Linnton, on the outskirts of Portland?

A. Yes.

Q. Did you ever go to the plant of the defendant Clark & Wilson Lumber Company in connection with the sale of those hydraulic carriers to it?

Mr. Geisler: If your Honor please, Mr. Gerlinger is suffering from a severe attack of asthma and he is not able to proceed at this time.

The Master: Well, of course, it was very evident this [336] morning that he was suffering considerable disability. You may proceed with the case. You expect him to be ready by tomorrow?

Mr. Geisler: He will be ready by tomorrow morning. He did not sleep a wink last night.

The Master: You may proceed with the case. You may continue his examination on his return.

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### HENRY NOEL DIMICK

was thereupon produced as a witness in behalf of the plaintiff herein, and, having first been duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Geisler:

The Master: State your name and address.

A. Henry Noel Dimick, Dallas, Oregon.

The Master: Take the stand.

Q. (By Mr. Geisler): What is your present occupation?

A. Mechanical draftsman and mechanic.

Q. Just kindly talk a little louder.

A. Mechanical draftsman and mechanic.

Q. Are you in the employ of the plaintiff here?

A. I am.

Q. When did you enter that employ?



(Testimony of Henry Noel Dimick.)

A. First at February 1st, 1923.

Q. What experience have you had in general along mechanical devices and mechanics?

A. Well, I have had considerable experience. Early in life, I believe at about the age of seventeen I began activities which connected me very closely with mechanical devices of various kinds.

Q. You heard the testimony here with regard to lumber carriers which were built at the plaintiff's shop at Dallas, Oregon? [337] A. Yes.

Q. The four machines that were referred to as numbers 1, 2, 3 and 4? A. Yes.

Q. Tell us what you remember, if anything, particularly about machine number 1?

A. Well, I remember a great deal about the mechanical construction of that particular machine.

The Master: What was that answer?

A. I operated this machine number 1 at various times at the Willamette Valley Lumber Company in Dallas and was more or less familiar with its mechanical construction.

Q. (By Mr. Geisler): State whether or not the construction of that machine was as shown in the drawing here of plaintiff's patent, Exhibit Number 2?

Mr. Fryer: We object to that on the ground that no foundation has been laid.

The Master: Sustained.

Q. (By Mr. Geisler): Are you familiar with the plaintiff's patent, Exhibit No. 2, known by the Number of 1457025?

(Testimony of Henry Noel Dimick.)

A. Yes, I have observed that patent. I am familiar with it.

Q. You have read it through, have you?

A. Yes, I have read the patent through.

Q. Are you conversant with the reading of patents?

A. Well, to a certain degree I am. I have read a good many patents, in fact.

Q. Now, will you state whether this machine, this lumber carrier, which you refer to as number 1, which you operated, was similar to, or not, to this patent Exhibit number 2?

Mr. Fryer: We object to that, if your Honor please, on the ground that the foundation laid shows that this witness has not the requisite capacity to advise the court with respect to the subject matter on which expert testimony is permissible in a [338] cause of this kind. He is a witness in this capacity supposed to have more than a passing ability to read a patent. The Court has that ability and a good deal more, and unless the witness is one who is peculiarly fitted in knowledge, training and experience to explain more than the ordinary ambiguity and difficulty in a patent drawing his opinion on the subject matter inquired about is not competent, and we object to it on that ground.

Mr. Geisler: If the Court please, any mechanic who is able to read drawings surely can describe whether he understands a device and whether another device which he is asked to look at——

(Testimony of Henry Noel Dimick.)

The Master: I am going to sustain the objection, not upon the ground given, but because the answer called for I don't think would be of any particular aid to the Court. You have your patent. He knows the machine. He can describe what was in the machine that is in the patent and what is in the patent that was not in the machine.

The Master: I will permit you to have this witness have before him there the drawings and the specifications and to describe the machine which he saw and operated, in detail, so that we can follow it—so that I can follow it along and see whether or not the machine which he operated was in fact a machine drawn along the drawings and specifications of this patent.

Mr. Geisler: I will ask that the bailiff present to the witness Exhibit No. 2. As I understand, you have studied that patent and are familiar with its description and illustration? [339]

A. That is correct. I have.

Q. Do you find in that patent a reference to the load-lifting means? A. I do.

Q. Will you describe to the Court what those load-lifting means consist of?

A. A load-lifting means is any——

Q. (By Mr. Geisler): I ask you to describe whether the load-lifting means are shown and described in this particular drawing and description of that patent, do you see?

A. Well, in this do you want me to make reference to different members?



(Testimony of Henry Noel Dimick.)

Mr. Geisler: If the Court please, before the witness testifies may I introduce those three enlargements as exhibits in behalf of the plaintiff?

Mr. Fryer: Are they photostatic enlargements?

Mr. Geisler: They are photostatic enlargements, yes. They are photostatic enlargements of the patent drawings as contained in the patent.

Mr. Fryer: We have no objections to those photostatic enlargements, your Honor.

The Master: Thank you. The last number I have is 25 for identification.

Mr. Fryer: That is right.

The Master: Figure number 1 will become Complainant's Exhibit 26; Figure No. 2, Complainant's Exhibit 27; figure number 3, 4 and 5 on  
(The three photostatic enlargements referred to were thereupon received in evidence and marked Complainant's Exhibits 26, 27 and 28.)

[340]

The Witness: Mr. Geisler, do you want me to follow it as described in the drawing by reading the patent and referring to the numbers?

Mr. Geisler: Yes; any way you want to. Be sure not to stand in the way of the Court while describing it.

The Master: I will follow you. Go right ahead.

A. First, I will ignore the description in the patent and I will go ahead with this just from my own memory.



(Testimony of Henry Noel Dimick.)

Q. (By Mr. Geisler): You have a right to refer to the patent if you want to.

A. I will if I feel it is necessary.

Q. Yes.

A. In this lumber carrier lifting device, first off the power is taken from a source through shaft 46.

Q. How is that source indicated?

A. The source here on the drawing is merely indicated by a pair of apparently miter gears.

Q. I will ask you to mark those by pencil, if you will, so that we know what those miter gears are.

A. Those are beveled or miter gears.

Q. I mean, just as a reference character, with pencil, to which we can refer.

A. Well, we will call those miter gears No. 1 then in pencil. Will that be all right?

The Master: No, because you are using other numbers. Use letters, A, B, and so on.

A. I give these miter gears reference character "A".

Q. A. Proceed.

A. From this apparent source of power—I should say the power is transmitted from this source through the shaft 46 to the clutch 47. This clutch, through a pair of worm gears, or a worm and [341] worm gear, carry power to shaft 50, which is longitudinal or a fore and aft shaft extending practically to the wheel base of the lumber carrier.

(Testimony of Henry Noel Dimick.)

A. This shaft extends for the length of the carrier practically to compare with the wheelbase. In other words, it runs nearly the extent of the frame. At each end of this shaft 50 are a set of worm gears through which the shafts 52 and 53 are caused to rotate.

Q. Are those worm gears indicated by any number?

A. Yes, I believe the worm gears are indicated by the number 51, but we will refer to the patent here to see if that is correct.

The Master: That is correct.

The Witness: It is correct? Thank you. On each of these—on either end of these shafts 52 and 53 are ordinary pinions, pinion gear, which mesh with racks, four racks, all carrying the number 56.

Q. (By Mr. Geisler): What are the numbers of those pinion gears that you refer to?

A. 54 and 55, the pinion gears at the front of the machine being numbered 54 and at the rear of the machine 55.

Q. Proceed.

A. Let's see. I have mentioned the racks, 56, haven't I? Attached to the lower end of the racks 56 at each corner of the machine by links—I don't find any numbers indicating this bar here.

Q. What bar are you referring to?

A. This bar right here that fastens onto the bottom of 56. 56 is here, but I don't find any number indicating this short coupling bar here. However, it

(Testimony of Henry Noel Dimick.)

is just a connecting link, which I think is very immaterial in the general construction of the machine. It could be round or square or flat, or whatever desired type to fit in with this mechanism.

Q. You are now talking about Figure 5—Figure 3? [342]

A. I am referring to the drawing, Figure 3, merely to find if there was a number to this coupling link. But, at any rate, at the lower end of this rack, these racks 56, of each of the racks 56, is a shoe or hook and it is designated here, the actual shoe is 59 on Figure 3.

Q. You might explain briefly how those shoes in conjunction with the rack bars 56 work.

A. Here on the drawing it shows member 62 is a roller fastened to the leg of the carrier frame, fastened in to the leg of the carrier frame. No. 60 are pins—I am afraid I will have to refer to the patent. I prefer not to make an error.

The Master: This part of the device is not in question here?

Mr. Geisler: No, your Honor.

The Master: What actually happens is, as that lowers the spring 60 pushes the shoe back, as it is brought up that part of the carrier frame pushes that shoe back into place; isn't that it?

Mr. Geisler: That is right.

The Master: That is all.

The Witness: That is correct.

(Testimony of Henry Noel Dimick.)

Mr. Geisler: You don't have to go into that, then. I just thought your Honor would like to understand it.

The Witness: Well, in that manner there is a more or less direct connection of the lifting device with the load lifting or grabbing members. Now we get back to Figure 2, I think is the best, and also Figure 1. We will refer to hand lever 70, which is shown here in red, and in this one in red.

The Master: Shown in Figure 1 in red and in Figure 2 in red? A. Figure 2 in red.

Q. (By Mr. Geisler): What happens in the rotation, referring to Figure 2, for example, of the shafts 50, 52 and 53 in either direction?

A. Taking into consideration those, this worm mechanism driven through this reversible clutch 47 by action of levers not previously described may be made to rotate in either direction. This [343] shaft 50—

Q. If it rotates in one direction what happens?

A. In one direction the load or the lifting members would be lowered.

Q. In the other direction?

A. And in the reverse direction they would be raised.

Q. You may proceed.

A. Now this lever 70 is provided as a means by which the operator may control the lifting device.

Q. You are referring now to Figure 1?



(Testimony of Henry Noel Dimick.)

A. I am referring to both Figure 1, 70 on Figure 1 and 70 on Figure 2, which are the same lever. As I said, this lever 70 is a member by which the operator controls the lifting device.

Q. In what sense does he control it?

A. Why, he just manipulates it by hand; by pushing the lever in one direction or the other he is able to control the lifting device insofar as raising and lowering the shoes or bringing the clutch to neutral position, or throwing the clutch into raising or lowering position.

Q. The clutch is the medium through which the control is exercised?

A. The clutch is the medium which governs the direction of the hoist, or is disengaged or engaged to place this mechanism in motion.

Q. Proceed.

The Witness: Just what was my last in the description there?

(Thereupon the previous answer of the witness was read as follows: "I am referring to both Figure 1, 70 on Figure 1 and 70 on Figure 2, which are the same lever. As I said, this lever 70 is a member by which the operator controls the lifting device.")

The Witness: Well, in order to move the shoes in one or the other direction the operator would push the lever until it en- [344] gaged any one of the three notches, any one of the two notches, either

(Testimony of Henry Noel Dimick.)

71 or 73, and I forget just the technical name that is given in the patent.

Q. What are the notches for?

A. They are just merely a stop or an indicator of the position of the lever, or to hold it in that position in case the driver would release it.

Q. Are they provided in any particular part—those notches.

A. These notches are just on a bar that is fastened to the front of the seat.

Q. Go ahead.

A. Well, to operate these shoes in either the raising or lowering direction, one of these directions, he would place the lever in one of the notches 71 or 73. Say that he placed it in 73 to lower the mechanism, lower the lifting; well, when he placed this lever in notch 73 that would engage this clutch and cause this worm gear to rotate in a direction that would move the shoes downward or toward the ground. Then at such time as the shoes reached a predetermined extent, traveled a predetermined extent in the downward direction, an automatic device is provided which will stop the shoes before they actually strike the ground, the wharf, or wherever the carrier happens to be operating.

Q. Point to those automatic devices in reference to the shoes.

A. Well, in this particular instance I will refer to Figure 3. At the top of the right rear rack bar 56 is a bracket. There is a bracket on top of the

(Testimony of Henry Noel Dimick.)

rack bar and fastened to it, through which passes a set screw 65. As the lifting shoes reach the lower limit of travel this set screw 65 engages a bell lever 66, the outer end of the bell lever is moved downward, causing the other arm of the bell lever to move in a direction which will move the clutch to neutral position, thus disengaging the clutch and moving this lever at the same time to the central notch 72. [345]

Q. Is that lever 70?

A. Lever 70 to notch 72, the center notch. Now as this occurs, as this lever is moved to the central position, there is a cam arrangement on a bar 74—I believe that cam arrangement in the bar 74 is shown in Figure 4 on the larger drawing Figure 3, and I would take it that this 74 indicates the connecting bar which connects the cam 75 with the lever 48, which is shown in red very distinctly on Figure 2. The movement of this lever 70 in the direction I have described as from the notch 73 to the notch 72, speaking of the lever 70, would also move this mechanism, such as 74 and 75, in the same direction.

Q. What would be the effect of such movement? What would it do?

A. Well, I am just getting to that. I am just trying to find the proper numbers—where they are located on these drawings. There is a brake arm 76 which on its under side is also supplied with a cam. Now I don't find a cam shown on this patent draw-



(Testimony of Henry Noel Dimick.)

ing but regardless of whether there is a cam there or not if this lever 75 was in a position where it didn't engage the bottom of lever 76, or it was disengaged with the higher points of the cam on that lever, the action when this lever 70 and 48, and connecting with the bar 74 carrying the cam 75, would move in that direction, these cams would contact at their higher point and raise the bar 76 and apply a brake to the shaft—a continuation of the shaft 46, which extends clear through to the outside—would apply a brake to a pulley wheel on the end, or a brake mechanism on the end of the shaft 46, on its outer end. Now that would constitute stopping the lifting mechanism by automatic means in downward position, or in the downward travel of the racks and lifting shoes.

Q. What would happen if the rack bars were moved in the opposite direction?

A. In this particular drawing if the rack bars—the reverse action of what I have described would be to put this lever in notch 71, which would put the cam I have described on the other [346] side of this lever, brake bar 76, and would engage the clutch in the reverse direction of what I have previously described; also cause the shafting 50 through the action of the worm and worm gear described, to rotate in the opposite direction, which would, through connection to the various shafts, move the shoes in the upward direction or lifting motion. In the case of the drawing shown, which I find doesn't



(Testimony of Henry Noel Dimick.)

thoroughly coincide with the description in the patent I was just reading, but, however, we will go ahead and describe that, these bars or shoes move in the upward direction—well, we will say with a load. Now if you had a load on cross members or bolsters, which are usually used on which to stack lumber, or other packages, with a load in the device, these shoes would move upward until the load struck this lever or bar 67, which extends across the frame on its underneath side, shown very plainly in Figure 3 and in Figure 1. It is shown in yellow there.

Q. What then happens?

A. I was getting to that. Just a minute until I get myself kind of straightened out here so I can put it so the Court will understand it. The load in coming upward would engage this bar 67 and raise it upward toward this underneath side of the carrier frame. The effect then, as this bar came up, would be, of course, in a pivot—I believe that is called a pivot, or it is a hanger, or it really is the shafting there, I believe, but it doesn't show plainly on the drawing; but, at any rate, this part is pivoted at 68.

Q. You are pointing on Figure 1 now?

A. Yes, 68 on Figure 1. Well, in the patent this 69 I believe is described as a bar with a cam-shaped upper end. That cam-shaped upper end of that bar in coming up would engage—well, I see now that I have got my action reversed on which would be the

(Testimony of Henry Noel Dimick.)

raising and lowering, but we will say, anyway, just suppose this lever would be on the other side, or we can reverse the action, [347] we will say that the raising direction really does put this lever over in 73, that would put this lever 48 in that direction. I believe it is shown here.

Q. In what direction would you say, right or left?

A. It would be the right hand direction.

The Master: Right hand to one sitting in the driver's seat?

A. Yes, right hand to one sitting in the driver's seat. And in this case that cam-shaped upper end, which cam may be described in different categories—there are various types of cams, in fact, but in this case I think this cam would be—the patent drawing doesn't show anything definitely about it but as a mechanic and one who has had some experience along those lines, if I were going to construct a machine of this kind and try to follow this description more than the drawing itself, which doesn't show in very great detail, I would build that cam in a sort of a wedge shape, perhaps a sloping top and short straight section at the upper end of this lever here. I believe that is shown something in that order right here. There is a cam on this (indicating)——

The Master: Referring to what?

A. Referring to Figure 4 on the large drawing as Figure 3. It is really Figure 4 in the patent

(Testimony of Henry Noel Dimick.)

drawings. That cam on the upper end of this bar referred to as bar 69, with the cam-shaped upper end and shown more distinctly in its particular arrangement in Figure 1, would engage the side of this lever 48 and perhaps some device put there to, oh, provide for wear and so on, but, however not shown in the drawing. It shows a plain lever there. And in doing that this bar coming up would undoubtedly move this lever 48 in the direction opposite to the contact of the cam. In other words, this cam came up underneath it. It would certainly, if it was shaped as a wedge and with a sloping top, and coming out like that (indicating)——

The Master: Go ahead. Don't pay any attention to me. [348]

A. (continuing) —would undoubtedly move this lever 48 toward the center of the machine or toward the left and bring the lever 70, with the various connections, to the center notch 72, which would bring the clutch to neutral position, disengage the clutch and apply the brake. As shown in this drawing that would be the action with a load. Now to go further than that, according to the description of the patent, which describes a means for stopping,—for bringing the clutch to neutral position or disengaging the clutch and applying the brake when the load lifting means have traveled to a predetermined extent in either direction, I believe that that is a correct——probably not in every word, but it



(Testimony of Henry Noel Dimick.)

is a correct description as given in this particular patent of '025.

Q. (By Mr. Geisler) In what particular paragraph of the patent do you find such a statement? Designate it by page and line.

A. I will have to locate it, because I don't remember just where it was. If there is anyone there that has it they can help me by just telling where it is.

Q. Let me call your attention to page one, line 18.

A. Line 18, page 1; all right. Yes, I have read that particular part of the description. Now is it desired that I go ahead and describe what would take place if this——

Q. Well, is that it? I didn't get whether you had reference to that.

A. That is the description I have reference to. It describes an operation there in the patent that I am unable to follow on this particular drawing, as the means to stop—"Another object is to provide a form of automatic stop for the lifting device that will operate when the limit of movement in either direction is reached, and also apply a brake mechanism." Now if they refer to something as being lifted with a load, I have described that, but if this means the particular limit of move- [349] ment in either direction, now I would like the advice as to



(Testimony of Henry Noel Dimick.)

what I am to do regarding that particular description as far as these drawings are concerned.

Mr. Fryer: We object to any leading or instructing of the witness by counsel. If questions can be put that are not leading it would be a proper method of examination, but certainly the witness is not to be instructed while testifying by counsel as to what to say.

The Master: Well, the counsel may direct the witness' attention to a particular part of the patent and ask what will happen if a certain operation is conducted or what will not happen, certainly.

Mr. Fryer: I have no objection to that sort of an examination, your Honor.

The Master: Let me see if I understand the inquiry of the witness. Am I right in saying that the device shown by the bar 67, or cam at the end of one branch or arm of that bar 67, upon the load being lifted, would throw the lever 48 into neutral?

A. That is correct, yes.

The Master: And engage the cam, or the cam on 74, so as to engage the brake or give braking effect.

A. Yes, that would engage the cam and apply the brake, as described, whenever this——

The Master: But the difficulty you are having, as I understand it, Mr. Witness, is that that particular device does not have any effect upon the downward movement of the rack.

(Testimony of Henry Noel Dimick.)

A. Now you are speaking of this particular device here (indicating)?

The Master: No. I am speaking about this cam on 69.

A. That has no effect on the downward movement. That is correct.

The Master: So it would have effect only on one movement [350] and you would need another device to take care of the other movement?

A. No. I have already described the device to take care of the other movement, the downward movement.

The Master: Which is the bell arm?

A. Yes, that is correct.

The Master: Which is 66, isn't it, or 56?

Mr. Fryer: 66.

The Master: 66. All right. Now have you any questions?

Q. (By Mr. Geisler) What is the purpose of the brake in a device of this kind?

A. The purpose of the brake in a device of this kind is that with these various members contained in this reversible clutch they are often quite heavy and they carry quite a bit of centrifugal force as they rotate, and the brake is of great assistance, for one thing, in stopping the rotation of that shaft and providing a device for control. Another purpose of that brake is that these lumber carriers operating on ordinary lumber docks or roads set up con-

(Testimony of Henry Noel Dimick.)

siderable of a vibration going over bumps, and so on, and the loads in lumber carriers would be inclined to settle and cause a sort of a reverse action through gravity in the lifting device, and as long as this brake is applied it is sufficient to keep the load from settling under those conditions.

Q. (By Mr. Geisler) Now with information that you got from the drawings and specifications here would you, as a mechanic, be able to build a lumber lift which embodied these features which you have testified about?

A. I would be able, from the drawings, used in connection with the description, I would be able to build the lumber carrier, taking the description and the drawings as a whole. [351]

Q. The Court asked of me that he would like to have quite specific information with regard to the operation of that lever 48. Now if I asked you to build a lumber carrier of that kind and wanted you to make a detail of the parts cooperating with lever 58, could you do it? A. I could.

The Master: Lever 58?

Mr. Geisler: Lever 48, your Honor.

Q. Did you make such a sketch?

A. I could make a sketch so that the average mechanic or workman would be able to construct that mechanism, yes.

Q. Well, did you make such a sketch at my request? A. I made such a sketch.

(Testimony of Henry Noel Dimick.)

The Master: I think perhaps counsel misunderstood me. The thing that was not clear in my mind was the 69 and 67, how that would actuate lever 48. But the witness has already explained that and I think I have a clear idea of it now.

Mr. Geisler: I have a sketch here.

The Master: Very well.

Q. (By Mr. Geisler) I will ask you to look at this sketch and state whether or not that is a detail of your conception of the mechanism shown by the patent drawings regarding lever 48 and the cooperating parts.

A. Yes, that is a sketch that I made, free hand sketch, just showing briefly what the principle of operation would be.

The Master: Mr. Geisler, if it will not disturb you, some time ago, Mr. Dimick, you were indicating on Figure 4 what I understood you to say was the cam, cam-shaped end on lever 67 which would contact with and move lever 48. Now will you take a pencil and indicate on Figure 4 where this cam-shaped upper end of 67 is shown, and mark that "C".

A. That would be this I was referring to on Figure 4, saying that I believed that this arrangement right here was the cam [352] described as being the upper end of the bar on bar 69 shown on Figure 1, and I believe that is what the draftsman who made these drawings intended this to be, this cam.



(Testimony of Henry Noel Dimick.)

The Master: Just mark that in pencil "C", with a lead line out from it.

(Witness marks as requested.)

Q. (By Mr. Geisler) Did you see a lumber carrier which was built substantially as shown by the patent, Exhibit No. 2 here?

Mr. Fryer: That is objected to, if your Honor please, on the ground that it is indefinite and uncertain, not specifying the time or place.

Mr. Geisler: Give me a chance to ask the question.

Mr. Fryer: I beg pardon. I thought you had completed your question.

Mr. Geisler: No. If you will, wait a moment. The first question, I would like to know whether he did.

Mr. Fryer: That is the question I object to, if your Honor please, on that ground.

The Master: Overruled. Answer.

A. I did see the lumber carrier.

Q. (By Mr. Geisler) Where and when?

A. Why, mainly at the Willamette Valley Lumber Company mill in Dallas, Oregon.

Q. At what time?

A. Well, it was in the latter part of 1922 or the early part—I am not just sure on the date.

Q. Was the lumber carrier there at that time?

A. Yes. It was in 1922 that I saw it there. Yes, the lumber carrier was there.

Q. Had you anything to do with that lumber carrier?

(Testimony of Henry Noel Dimick.)

A. Oh, when I first observed the machine there and saw it there I was interested in the operating of these machines and I used to relieve the driver, the regular driver there sometimes for a half hour or hour in order to become familiar with this type [353] of machine; that is, when the machine was first put into operation, or during the first part of the time it was in operation by the Willamette Valley Lumber Company.

Q. You were present in court this morning and other times and heard about machines numbers 1, 2 and 3 manufactured by plaintiff corporation. Which machine was that?

A. Well, I think that this—according to the conversation and questions asked in court I believe that that was—I am sure that that was the number 1 machine, what they refer to as the number 1 machine.

Mr. Fryer: We move to strike the answer on the ground it is the witness' conclusion and opinion based upon an interpretation of the record in this cause, completely without any foundation of any knowledge on the witness' part.

The Master: Sustained. But you may have your answer stand over the Master's ruling, if you desire.

Mr. Geisler: If you please.

The Master: All right. Both counsel understand in any matter they may do that.

Mr. Fryer: Yes.

(Testimony of Henry Noel Dimick.)

Q. (By Mr. Geisler) You were present here in court and heard the description by Mr. Gerlinger of what he called No. 1 machine? A. Yes.

Q. Now with reference to that description what do you say this machine was?

Q. Mr. Fryer: I think that is subject to the same objection, if your Honor please.

The Master: Let me have that question again.

(Last two questions read.)

Mr. Geisler: If your Honor please——

The Master: I get your point.

Mr. Geisler: It was testified here——

The Master: The objection will be overruled.

The Witness: Would you read that question again, please. [354]

(Last question re-read.)

A. This machine was the number 1 machine.

Q. (By Mr. Geisler) You were present in court and heard Mr. Gerlinger speak of number 2 and number 3 machines, which were some mechanical change from this patent drawing and description, were you? A. I heard that, yes, sir.

Q. I call your attention to Exhibit No. 6. Did you at any time see a lumber carrier having lifting mechanism and controls therefor as shown in this Exhibit 6?

Mr. Fryer: Now may I have that whole question at once, if your Honor please?

(Last question read.)

(Testimony of Henry Noel Dimick.)

The Master: You may answer the question.

A. I did, yes.

Q. (By Mr. Geisler) When and where?

A. First at the—the first time that I saw these carriers they were at the plant of the Dallas Machine & Locomotive Works in Dallas, Oregon.

Q. At what time?

A. Well, I am unable to place that exactly, but it was about, oh,—well, it was the latter part of—well, I would say it was the first part of the year 1922.

Q. What was the occasion of your seeing that?

A. Well, these two machines, or this one machine, I should say, of course in connection with another machine, were being built by the Dallas Machine & Locomotive Works at their plant in Dallas.

Q. Did you know where those machines were going?

Mr. Fryer: We object to that, if your Honor please, as wholly beyond any foundation laid with this witness. He went to work for the Dallas Machine & Locomotive Works in February of 1923, according to his testimony, and this is a series of events that took place in 1922, and now he has asked if he [355] knows where the plaintiff intended to send these machines. There is utterly no foundation for any knowledge of his own as to those facts. We object to it on that ground.



(Testimony of Henry Noel Dimick.)

Mr. Geisler: The witness can state if he knows whether he knows; if he doesn't he doesn't.

The Master: Well, could his knowledge be other than hearsay?

Mr. Geisler: No, positively not.

Mr. Fryer: Well then, we object to it on the ground it is also hearsay.

Mr. Geisler: No, I don't say it is hearsay. I say that he knew of it.

The Master: Let me hear the question.

(Last question read.)

The Master: You may answer whether you did or did not.

A. I did know where the machines were going.

Q. (By Mr. Geisler) How did you come to know it?

A. Well, I had been promised a job driving one of these machines at the Cobbs & Mitchell Lumber Company in Valsetz, Oregon, and from that I am pretty certain that must be where they were going.

Mr. Fryer: Now we move to strike the testimony concerning those machines on the ground it is purely hearsay, a conclusion and opinion of the witness on a fact question.

The Master: Sustained. The motion to strike will be sustained, but you may have the answer notwithstanding the ruling, if you want it.

Mr. Geisler: No.

(Testimony of Henry Noel Dimick.)

Q. Did you afterwards see those machines at the Cobbs & Mitchell Lumber Company?

A. I saw those machines at the Cobbs & Mitchell Lumber Company, yes.

Q. Were those machines, as far as the hoisting mechanism, load hoisting mechanism and the controls therefor, identical as [356] shown here by Exhibit 6? A. Yes, they were.

Q. Is there any circumstance which particularly fixed in your mind the identity of one of these two machines that went up to Cobbs & Mitchell Lumber Company? A. Yes, there are.

Q. You may state them.

The Witness: May the Court please, am I allowed to ask a question in order to straighten myself out on this question?

The Master: If you don't understand it you may ask a question.

The Witness: Well, first I want that question read, please.

(Last two questions read.)

The Master: He wants to know whether there are any circumstances that enable you to fix the identity.

The Witness: Yes, but he said one of the two machines?

The Master: Yes.

A. Well, soon after I started driving lumber carriers at Valsetz one afternoon a crew of car-

(Testimony of Henry Noel Dimick.)

loaders who were loading a gondola car got the car finished and it was in the way of other material that was to be loaded, other lumber, and the car had to be moved and this group of carloaders, under the direction of one Major Leland, who was manager there at that time, moved the carrier by using one of these carriers——

The Master: Moved the what by using one of these carriers——

A. They moved the car, the gondola car on the track, by the use of one of these carriers and a push pole or gill poke; I think push pole is the more common term. Several trials with the carrier were necessary before we could get the car started moving, and we had to drive away from it and bump the pole, and so on, and then shake the car loose, and during this starting of the car, why, the man who was holding this push pole got nervous or something and he missed his aim and struck the carrier above the frame and damaged some of the [357] parts of the automatic stop, and also caused some damage to the right rear worm housing, which would be as shown on—well, take this drawing, it is this worm housing here (indicating).

The Master: Referring to Exhibit 6?

A. Referring to Exhibit 6, yes.

Q. (By Mr. Geisler) Where did this happen, please? Where did this happen?

(Testimony of Henry Noel Dimick.)

A. At Valsetz, at the mill at Valsetz, Oregon, of Cobbs & Mitchell Lumber Company, on their docks. Some time either that evening or later, I don't remember—it seems to me it was that night, because the work was done as I remember after darkness—parts were brought from the plaintiff's shop, Dallas Machine & Locomotive Works, in Dallas, to make repairs.

Q. Who brought those parts?

A. As I remember, Mr. Grab brought them up. I think that is one of the first times I met Mr. Grab. In fact, I do remember quite distinctly of him being there, and I assisted him in the work. And some of the holes drilled for fastening those new parts to the carrier had not been supplied, or weren't in the proper places, and in order to get the carrier working properly, why, it was necessary to do some more drilling and I located the parts in their position and marked the holes and then took the parts in to the mill shop and did the drilling, and that is one of the instances which recalls parts of this mechanism to my mind.

Q. Did you see number 2 and number 3 carriers at the plant of the plaintiff?

A. Yes. Shortly before they were delivered I went over there in the company of the driver of the number 1 carrier for the Willamette Valley Lumber Company, and looked at these carriers.



(Testimony of Henry Noel Dimick.)

Q. Do you remember whether or not at that time any photo was taken of those lumber carriers?

A. Well, at the particular time I made this visit in company [358] with the driver I don't think there were any photos made at that time but later on I happened down there just at a time when a photograph was being taken of these carriers.

The Master: Mr. Geisler, for the time being if the witness is not going to have to refer to these exhibits he might take a seat there.

Q. (By Mr. Geisler) I will ask the bailiff to show this photograph to the witness. By looking at that photograph does that bring any circumstance back to your mind? A. It does.

Q. Where was that photograph taken?

A. It was taken at the Dallas Machine & Locomotive Works, in Dallas, Oregon.

Q. When, about?

A. Oh, I would say it was, as I remember it, in the early part of 1922.

Q. Do you recognize some of the people that are appearing in that photograph?

A. Yes, I recognize quite a number of them.

Q. Mention those that you do recognize there.

Q. Well, beginning with the group standing on the ground, the man standing at the front on the left with his hand on his hip, is Nels Anderson.

Q. That is the man with his arms akimbo?

A. Yes.

(Testimony of Henry Noel Dimick.)

Mr. Fryer: If the Court please, I may suggest if the purpose of this examination is to lay any foundation for the offering of this photograph it may all be dispensed with, because I have no objection to the photograph. It is wholly immaterial to any issue. If it is taking time to lay a foundation I will waive it and it may be offered.

Mr. Geisler: Fine. I want to show that those are the two [359] machines that the witness saw at that particular place.

Mr. Fryer: Offer them for that purpose, then. I have no objection. It will save time.

(The photograph referred to was thereupon received in evidence and marked Complainant's Exhibit 29.)

Mr. Fryer: I make no objection to this photograph, either, Mr. Geisler, so far as its authentication is concerned. My only objection is that it is wholly immaterial, but I will waive that one also, if you want to offer it.

Mr. Geisler: I offer this in evidence, your Honor.

The Master: It will become Complainant's Exhibit 30.

(The photograph referred to was thereupon received in evidence and marked Complainant's Exhibit 30.)

Q. (By Mr. Geisler) Who made that drawing perspective, Plaintiff's Exhibit 6?

(Testimony of Henry Noel Dimick.)

A. I made the drawing, Exhibit 6.

Q. From what did you make it?

A. I made it from the lifting mechanism taken from a carrier that was set up in the Dallas Machine & Locomotive Works' shop, or in a room just adjoining the drafting room at Dallas, Oregon.

Q. From what machine was that particular lifting mechanism obtained?

A. I understand it was from the machine, I believe number 4.

Q. State whether or not the lifting mechanism from which you made that Exhibit No. 6 is identical with the lifting mechanism which you saw in Carriers Nos. 2 and 3.

The Witness: May I have the privilege of asking another question of the Court?

The Master: Yes.

The Witness: Now in view of some things that have happened in court, I just want to ask, when I make these answers do such fine details as the size of bolts, and whether a cam is shaped [360] as a wedge or round member, offset to a shaft, or something like that, or hammer marks, or things like that, do they change the detail of the drawings according to the Court, or is it just in general the way this machine was set up? Is that what you mean?

Mr. Geisler: In substance, yes.

The Witness: In substance, yes.

Q. Substantially the same thing?

(Testimony of Henry Noel Dimick.)

A. In substance I answer yes to that question.

Q. I show you a photograph here and ask you to state what that is.

A. That is the lifting mechanism as set up in the room near the drafting room at the Dallas Machine Works, from which I made this perspective drawing.

Q. Exhibit No. 6?            A. Exhibit No. 6.

Mr. Geisler: Any objection to that?

Mr. Fryer: No.

The Master: Are you offering it?

Mr. Geisler: I am offering it, your Honor.

The Master: It becomes Complainant's Exhibit 31.

(The photograph referred to was received in evidence and marked Complainant's Exhibit 31.)

Q. (By Mr. Geisler) Now by referring to Plaintiff's Exhibit 6, state the parts you find in Plaintiff's Exhibit 6 which are similar to the parts in the patent drawings of Plaintiff's Exhibit 2; similar in function, I mean.

A. Yes. Well, beginning with the lever 70, which in the operation of the hoist is the primary member or the hand lever which has those three notches 71, 72, 73, to provide for its control, those are as described, materially as described and shown in the patent drawings. Also this lever is materially as described and shown.



(Testimony of Henry Noel Dimick.)

Q. When you point to the parts describe them.

[361]

A. Lever 70.

Q. That is what number?

The Master: 70, he said.

A. Is materially the same. I might say that on the lift, the photograph of the lift in that particular photograph there, that this lever don't bend over; this lever is not shown bent over in this direction; but the reason in making these drawings I put the lever just straight is the fact that—may I ask again, would I be permitted to mention—

The Master: Go right ahead.

A. I made two other views of this same mechanism, showing this lever in two positions other than this one, which is neutral position. In order that it would be clearer to read this drawing and show more clearly, in making the drawing I didn't put that bend in the lever, but otherwise this lever represents quite distinctly the hand lever 70 mentioned in the patent and shown on the patent drawings.

Q. (By Mr. Geisler) May I interrupt you a moment? Do I understand you made two other drawings? A. Yes.

Q. Which show that lever in other positions?

A. Yes, they show it in other positions, but in order to answer the question as you put it, just

(Testimony of Henry Noel Dimick.)

those that compare, I wouldn't need to have the other one set up.

Q. Very good.

A. If it will save any trouble.

Q. Interrupting you once more, there are certain numbers which are reference numerals on that Plaintiff's Exhibit 6. With what, if anything, do those numbers correspond? With what, if anything, do they correspond?           A. These numbers?

Q. Yes.

A. They correspond to the levers, the operating levers shown under the numbers, the reference numbers 70. These notches [362] compare with the notches 71, 72 and 73 shown in the patent drawings of '025. This lever 48 as shown by this leader here represents materially the same structure as shown by lever 48 shown in the patent drawings of '025. This bar here—on this drawing I haven't given it a number—would take the place of this, what I imagine is, and the letter here would indicate is, the bar of connecting link 74 on Figure 3 of the patent drawings. Now Figure 4 of the patent drawings and on the enlarged model Figure 3: This clutch shown in the orange would be the reversible clutch mentioned in the description and shown on the patent drawing, and as the cone which on this doesn't have a number, and the shafting member, shafting part and other devices there that compare with the parts mentioned in the description and on

(Testimony of Henry Noel Dimick.)

the patent drawings. This housing contains a worm gearing 49, which is mentioned and shown in the drawings of '025, and I believe that would be in this Figure; this 49 right here in Figure 5 designates that worm gear.

Q. Of the patent drawings?

A. Of the patent drawing, yes; Figure 5 of the patent drawing. And this shaft 46 is shown in Figure 5 of the patent drawing. The lever or bar 76 is shown in the cross section right at the pointer here in Figure 4 of the patent drawing. This cam 75, or the sliding or moving cam, is shown in Figure 4 of the patent drawing at this point directly there at the pointer.

The Master: In Figure 4?

A. In Figure 4 of the patent drawing. This 75 runs up to the cam. You see the color of it there, and that represents this same 75 on this drawing here. And the reverse, or I should say the rack bars—I will start here: This shafting 50, shown as 50 here, pointing to the shaft that is a continuous shaft on both sides of the worm housing; that is the same shaft that is shown—well, it is shown under 50. Shall I take this down and show you where it is?

The Master: I know where it is. [363]

A. O. K. That is shown on 50 in the patent drawings. The cross shafts 52 and 53 are shown on the patent drawings. These pinions 54 and 55 are



(Testimony of Henry Noel Dimick.)

shown on the patent drawings. These rack bars 56 are shown on the patent drawings. This lever extending rearward here from the lever 70 is a similar lever shown in the patent drawings and I am quite confident referred to as 64 in the patent drawings; and this bell crank, or a bell crank is shown.

Q. (By Mr. Geisler) What number?

A. 66, is shown in the patent drawing. The bar 67, 67 here on Exhibit 6 and 67 on Figure 3 of the patent drawings.

The Master: May I ask a question there? On exhibit 6 does 67 perform any function, or is that function now taken up by 90 and 91 on Exhibit 6?

A. No, it wouldn't be replaced by these. It wouldn't be replaced by those. It is an upper load stop. It acts only when the carrier is carrying load.

The Master: What is 90 on Exhibit 6?

A. Well, it is an engaging member. It is pivoted on a bracket back alongside of this worm housing, and it is merely placed there to engage the end of this bell crank 66. In other words, when 91 would travel upward and engage 90, 90 would engage this arm of the bell crank 66 and move this lever in this direction and at this end through the connecting links and pivoting at 63, and in this particular instance would, provided this lever were in the—

The Master: Lever 70?

A. Lever 70, were in the lifting position, which is at the notch 71, that action would throw this lever



(Testimony of Henry Noel Dimick.)

back to the central position, as shown here, or neutral position, and when that occurred that would disengage the clutch and apply the brake.

The Master: Well, if 90, when it makes an upward movement, strikes 91, engaging with the bell crank, then thereby shifting [364] the lever 70 in neutral, what function does 67 play?

A. Perhaps I can best explain that. This mechanism here is provided in order to protect the lifting mechanism, provided the driver didn't have a load in the carrier or had a load that wasn't of sufficient height to come up and strike this lever sixty—bar 67 before the racks had reached the limit of their travel, which would be determined by the number of teeth on the rack.

The Master: May I ask another question there, Mr. Dimick? Is the relation of 90 to the rack such that when the load is on, a full load, the top of the load would engage 67 before 90 engages 91?

A. A full load would engage 67 before 91 would engage 90. That is the way you meant to put it, wasn't it?

The Master: Yes. I can't see quite that far.

A. That is correct.

The Master: Yes; 91 would engage 90.

Q. (By Mr. Geisler) In other words, the way I understand it, there are two independent devices which control the upward movement; I mean the rack bars 56?

(Testimony of Henry Noel Dimick.)

A. Yes, that is correct. This drawing shows it that way.

Q. And the Court's question explained the functions? I say, your answer to the Court's question explained their function?

A. Yes, I have explained their function.

Q. Did you make a model illustrating a load lifting and lowering method and controls therefor, as shown by Exhibit 6?

A. I didn't myself. I directed it.

Q. It was made under——

A. It was made under my direction at the Dallas Machine & Locomotive Works, yes, and this model does exist.

Q. Have you examined that model critically and carefully?      A. I have.

Q. And state whether or not it is a symbol in all respects the [365] same as the drawing, this perspective drawing, Exhibit 6, in substance, at all events?      A. In substance it is, yes.

Q. And shows the operation of the different mechanical devices which are shown by Exhibit 6?

A. Principally it does. There is one thing now speaking of the model, which I don't believe has an exhibit number——

The Master: Exhibit 13 for identification.

Mr. Geisler: To make it clear to the Court I will withdraw some of these charts; so will you take

(Testimony of Henry Noel Dimick.)

some of these away, Mr. Bailiff; all except the middle; leave that there.

Q. Now please explain to the Court how this model operates, and if there are any differences in construction between that and Exhibit 6 point them out.

A. Well, the constructional differences are not very great. The thing that I started out to bring to your attention was the fact that here 47 on this drawing and 47 on the patent drawings of '025, why, we describe a reversible clutch. Due to the model being so small and the necessary frailness of any integral parts of that reversible clutch, we didn't make the clutch reversible in this particular model but at least we must take it for granted in this model that the mechanism designated by the number 74—47, pardon me—is the reversible clutch; and in order to get a reverse action of the shaft 50 we have loosely applied the worm gear, what would be a part of 49 on the drawings, on the shaft 50; and, in other words, it isn't affixed to the shaft 50; so that by moving this upper crank on the front end of shaft 50 in either direction we can get a reverse motion of this shaft 50.

Q. Would that motion illustrate the same action as in Exhibit 6 with regard to the raising and lowering of the load?

A. It would, yes, sir.

Q. And braking mechanism? Proceed with your explanation.

(Testimony of Henry Noel Dimick.)

A. Well, at present the shoes are lowered at the moment and [366] we are prepared to, would be prepared to either raise the shoes empty or take up a load if a carrier similar to this model were in operation. In order to lift the load the driver would put this lever in the position shown——

The Master: Lever 70?

A. Lever 70 in the position shown, or say he were sitting in the center of the machine here he would pull it toward him, which would engage this clutch 47, move the cam 75 from under the brake bar, the corresponding cam under the brake bar 76 at this point, and allow this brake bar to release its pressure on pulley or brake wheel 77; and immediately this action of the clutch, and so on, took place, why, the source of power would be directly connected to the lift through those mechanical movements, which would cause the shaft 50 to rotate in the upward or lifting motion, and as the rack bars 56 raise——now we are kind of pretty close to the point now (illustrating)——there is a contacting member fastened on the inside of this rack here; I don't see it, but that represents the part 91, as shown on the perspective drawing, Exhibit 6.

Mr. Flegel: You can see it there (indicating).

The Master: Right.

The Witness: Now as that comes up and approaches the top of the frame you will note that it engages and this lever 90 is pressed in there; it has



(Testimony of Henry Noel Dimick.)

already engaged; 91 has engaged 90, and this lever is pressed tightly against the lower end of the bell crank 66; well, if that motion continues, which it would in normal operation, that brings the lever to the central or neutral position, which is indicated by 72, the notch 72 on Exhibit 6 and also on the drawings, the patent drawings of '025; and you will note that this bar here is moved over and puts the cam on——

The Master: When you speak of “this bar”, what bar do you mean?

A. Now I will just operate it.

The Master: I have got it but I want to get it in the record. [367]

The Witness: This 48, you see, is disconnected with the lever 70 and so this bar here is connected to bar 48.

Mr. Geisler: When you say “this” always state the numbers, as the Court suggests.

The Witness: I see. The bar——

The Master: 74, according to this?

A. 74, yes. This extension or rod moving out from 48, out to here, would represent the bar 74, and the cam 75 being on the top of this, that movement has placed the cam 75 directly under the cam on lever 76, which has raised this rod or brake bar and applied the brake to——

Mr. Geisler: Which rod or bar is that? Has it a number?

(Testimony of Henry Noel Dimick.)

A. Rod 76, and applied the brake by pulley 77. Now do you want to go through the downward action as well?

Mr. Geisler: You might just as well.

The Witness: All right. Presuming that this mechanism had been raised and reached the upper extreme limit of travel, it would be—all the parts named in connection with the lifting device would be in the position as shown here, or neutral position. Then in order to lower the lifting members or bring about a lowering action in the lifting device, the operator would push this lever away from him or to his right, or to the right of the machine, which I have done here.

Q. In other words, in an opposite direction from that?

A. Yes, in an opposite direction. That has moved—also moving the lever 70 to the lowering position has moved the lever 48 in the same direction and also the bar 74 in that direction, that same direction, and bringing the cam 75 at the contact—make that central contact—with the cam on brake bar 76, allowing brake bar 76 to drop and release contact with the pulley 77. Now all of the members, including the lever 64, bell crank 66, bar 90 and stop 91, are starting, are in position for the lowering movement of the lifting device. All right. Then if we go [368] this way, which would be the rotation of that shaft in lowering position or lowering mo-

(Testimony of Henry Noel Dimick.)

tion, that action continues from the source of power and you will observe as it travels down the set screw designated by 65 on the perspective drawing, Exhibit 6, and on the patent drawings of '025, is coming down directly above the arm of bell crank 66. As that downward motion of the lifting device continues the set screw 65 contacts the bell crank 66 on the outer arm and presses it downward, which action, through connection of bar 64 or lever 64, returns the lever 70 to neutral position, thus disengaging the clutch and applying the brake, as previously described.

Q. When you referred to '025, you had reference to Plaintiff's Exhibit 2, the patent?

A. Yes. But the drawing was out here and I had to just refer to that.

Q. Yes; you just referred to the last three numbers of that patent?

A. Yes, the last three numbers in '025.

Q. Looking at the photograph is the brake operating mechanism which you testified to as shown on the model and in Exhibit No. 6, shown on the photograph also there?

A. On this photograph?

Q. Yes. A. What is the exhibit number?

The Master: 31.

A. Yes, that brake is shown there.

Mr. Geisler: I now offer the model in evidence.

Mr. Fryer: If the Court please, we object to the

offer of the model, Exhibit 13 for identification, on a number of grounds. The principal ground is that it cannot be and is not material to any of the issues raised in this cause. It cannot be material to the issue of alleged commercial success of the device in the patent, because the evidence offered so far shows that it is lacking the mode of operation distinctive of the machine of [369] the patent in suit. It is a machine having parts 90 and 91 which make it a machine which will stop the upward movement of the load lifting means irrespective of the presence of a load in the machine, a fundamental and characteristic difference in operation to that of the machine shown in the drawings of the patent. For that reason it cannot possibly show commercial success, because if this model is to show that machines as shown in the model were made and sold, it merely proves that machines other than machines having a characteristic mode of operation of the patent are made and sold, and that has no bearing on that at all. If the purpose of the model is to explain the construction and operation of the machine of the patent, it is wholly immaterial, and not only immaterial but misleading, because, for the same factors which I have pointed out, it does not show the construction or mode of operation of the patent but, on the contrary, it shows a machine having a distinctly different character as to mode of operation.



The Master: You mean in what regard?

Mr. Fryer: In the fact that the machine in the model is one which will terminate upward movement of the load lifting means irrespective of the presence of a load in the load lifting device. That is something which the machine of the patent cannot do. The machine of the patent is one which will terminate upward movement of the load lifting device solely and only in the event that a load is placed in the machine having the size and shape necessary to engage the bar 67. Lacking a load in the machine having the size and shape necessary to engage the bar 67 the machine of the patent will not terminate upward movement of the load lifting device. In the model, Exhibit 13, on the other hand, as has just been demonstrated to your Honor, upward movement of the load lifting device will be terminated with no load whatsoever in the machine. There is a fundamental characteristic and all-important difference, therefore, in the machine [370] of Exhibit 13 and the machine of the patent in suit, and for that reason, then, the model is not material or relevant to show either commercial success of the machine in the patent or to show and explain the construction or operation of the machine in the patent, or to show any possible similarity between the machine of the patent and the accused device. And on the last point, a further reason why Exhibit 13 is not material or relevant to show any similarity

or identity between the patent and the accused device is the fundamental and well recognized rule that for that purpose the only thing which is material is not any machine which the plaintiff may have built but the machine shown in his patent.

The Master: May I make this inquiry of counsel for the defendants? Other than the fact that the Exhibit 13 for identification contains elements which enable the upward movement of the rack to be stopped when there is no load on it, other than that fact does the model exhibit the principles of the claim 4 of the patent?

The Master: Just to get clear in my own mind, Mr. Fryer, as we go along, if on model 13 there should be placed a load, what you have designated as a full load, is there any question that bar which is marked 67 on that model would stop the upward movement of the carriage?

Mr. Fryer: It would all depend, your Honor, upon the size and formation of that load. If it were as some of the loads which we will demonstrate to your Honor later on in this case, with some boards in one position and others in another, or if it were loads of sacks of cement with spaces between them, the movement of the load upwardly might not operate 67 to cause any result whatsoever and the part 90 and 91 would then [371] function to terminate the upward movement, and that is an operation which is wholly foreign to and impossible in the

operation of the patent in suit. In other words, it gives the machine a completely different principle of operation and our Ninth Circuit Court of Appeals here has often announced that the mode of operation is the thing which counts. For instance, in *Riverside Heights Orange Growers' Association v. Stebler*, 240 Fed. 703, our Circuit Court of Appeals said, "If the device of respondent shows a substantially different mode of operation, even though the result of the operation of the machine remains the same, infringement"—that is identity—"is avoided." So that it is true that Exhibit 13 is substantially the machine of the drawings of the patent in suit except for the addition to that exhibit of the parts 90 and 91, but the mere addition of those small parts makes a complete fundamental change in the mode of operation of the machine.

The Master: Now Mr. Geisler, what is your position with regard to parts 90 and 91? Do you claim that they are disclosed by the patent?

Mr. Geisler: Yes, Your Honor. We do not disclose—limit ourselves to any specific means, but the introduction states, "Another object is to provide a form of automatic stop for the lifting device that will operate when the limit of movement in either direction is reached, and also apply a brake". Again, before the specifications, I mean the claims, it states: "Any desired form or reversible clutch



may be used and any old or common form of brake for the driving mechanism", and so on. And, "Other details may be varied in their form and location, and in general the invention is intended to be limited only by the scope of the appended claims."

Now in the argument that counsel advanced he didn't give the proper emphasis to what the courts say about substantial identity. Now the only thing there is here, we have brought out by the witness two different modes in which the [372] raising of the load is limited, one by means of putting a load on the carrier, another to assure that it will stop. Now there would be the necessity of course, probably as developed in the manipulation and the running of this carrier, that if the carrier were empty and you applied the load lifting element, why, the thing would go and something might snap, break; so it was a natural expedient. However, the idea is fundamentally the same means for limiting the lifting of load.

Then take the position of the defendants here, your Honor, which we must always bear in mind; a solemn admission of course would have to have some weight. The defendant for the purpose of laying foundation for laches states that the plaintiff neglected to assert any rights under the patent against the defendants' carrier, or others substantially identical therewith.



Mr. Fryer: You didn't read that all.

Mr. Geisler: Substantially identical therewith. Pardon me. Substantially identical. Now does the claim limit anything here? It says I claim load lifting; we have the power; and then we have means for moving the clutch—means for moving the clutch into neutral position upon the movement of the load lifting means to a predetermined extent in either direction. That is the claim. That is what we brought suit on. The device which we alleged in our bill of particulars as being the source of the brake shows identically the thing which is shown by Exhibit 6. The defendant admits that it furnishes that manual to the trade and admits that it is manufacturing a device just as shown in that manual. So there we have a combination of these admissions that the thing which the defendant made is as shown in the service manual, which is part of the exhibit of the bill of particulars. Further, the admission that the service manual shows a device which is substantially identical to the plaintiff's patent, we claim. So, your Honor, I feel as if I am wasting the Court's [373] time by trying to cite any further authorities, because it is an elementary rule, as far as that is concerned.

Mr. Fryer: May I answer one question?

The Master: Yes, Mr. Fryer, of course.

Mr. Fryer: I believe most of the remarks of Mr. Geisler do not answer the inquiry which you ad-

dressed to him. There is only one statement made by him which I can discern as having any bearing on that question. He was asked to point out whether or not the patent showed parts 90 and 91, and he quoted a portion of the specifications which he relied on as being a disclosure of that part. Now that portion of the specification is statement of the object of the invention. Of course the statement of the object of the invention is merely the expression of a hope, but not a disclosure of any construction. He did not point to any portion of the description showing parts 90 and 91, and we have the patentee's own statement that no parts 90 and 91 are found in the patent.

The Master: What it comes down to, Mr. Fryer, is this: whether or not 90 or 91 are mechanical equivalents?

Mr. Fryer: No.

The Master: It doesn't come to that?

Mr. Fryer: No. It is much deeper than that. It is the question of the fundamental mode of operation of the machine as a whole. Irrespective of the language of the claims, it is the mode of operation that counts. It is true in this patent the patentee has obtained a patent with language broad enough to include a machine known as a carrier and every one that has ever been built, our proofs will show. He has been granted a claim much broader than his contribution to the art. So that he comes directly, as

these authorities will show, where plaintiff attempts to show an infringement by trying to literally read his claims on the defendant's structure he does not use the proper test, even though the plaintiff could bring the defendant within the letter of the claims, if there is a difference in the mode of [374] operation. Now 90 and 91 cannot do anything in the disclosure of the patent in suit, because the whole theory of the disclosure of the patent in suit is that the machine will not work to stop the upward movement of the load lifting means unless you have a certain kind of a load, a certain height, certain length, and so forth, in the machine. That fundamental mode of operation being different, it is not a matter of equivalency between 90 and 91 and anything shown in the patent.

The Master: Well, I will admit this exhibit, not however holding that the questions raised by counsel for the defendants as to the relatively different means of operation existing—making no holding upon that but reserving that question for further consideration. And so far as 90 and 91 are embodied in this Exhibit 13, I will place upon the plaintiff the burden of showing that those are within the language of the disclosures of the patent; not the burden of proof, but I mean for my own satisfaction.

(The model heretofore marked for identification as Complainant's Exhibit 13 was thereupon received in evidence.)



Mr. Fryer: Did you wish to ask a question?

The Master: Yes, I did. This question need not be answered by either party if it will interfere with their conduct of the defense or the prosecution of this action, but I just want to see whether I understand the position of the defendants.

Mr. Fryer: I will try to answer you in a way to help Your Honor, in any way I can.

The Master: Am I right in stating that your position is that a device for stopping the upward movement of the rack which is not accomplished by means of the load engaging either with bar 67 or a mechanical equivalent is such a different [375] method of operation as not to come within the disclosure of the patent?

Mr. Fryer: I could perhaps state it this way—I doubt that I can answer that “yes” or “no”—the machine of the patent, as I understand it, and as we hope to prove, has no mechanism whatsoever which will stop upward movement of the load-lifting means in a number of cases, the first of which is if there is no load in the machine. If there is no load in the machine, the machine of the patent will never stop upward movement of the load-lifting means, and mis-operation will result, and the machine will be destroyed, unless we have this safety device which has been excluded from the case. A similar result will happen to the machine of the patent if the load placed in the load-lifting means



is not high enough to strike 67 in time to prevent the rack bars from reaching the end of the teeth on those bars. In that event, you will wreck the machine before you will stop upward movement of the load-lifting means. So that the machine of the patent, as our evidence will show, is such that unless you have exactly the right size load, with exactly the right shape, so that at the proper time it will strake bar 67, the machine of the patent will be destroyed, unless this safety device, which is not involved in this suit, happens to work. Now, the minute you add to the machine of the patent parts which give the machine of the patent a wholly different mode of operation, that is, parts like 90 and 91, which will operate merely by upward movement of the rack bars, irrespective of any load in the machine, the conditions of operation which I have mentioned do not occur. With those parts added, the load-lifting means will stop as soon as the rack bars have moved the predetermined distance, and that by virtue of contact between 90 and 91, and that contact, as is evidenced, will occur no matter what size or shape of load is in the machine or whether there is no load in the machine. So that our position is that 90 and 91 are parts foreign to the [376] whole teaching of the patent in suit, they are parts which operate in direct antithesis to the theory of operation of the machine of the patent in suit. In other words, the patent in suit is a load con-

(Testimony of Henry Noel Dimick.)

trolled stop machine, and a machine like Exhibit 13 is a lift controlled where the stop is controlled solely by the lift. The machine of the patent in suit has a stop which is not controlled by the lift in any way, but on the contrary is controlled entirely by the presence and character of the load in the machine.

I don't know if I have made myself clear, but that is our position. Does that answer your question?

The Master: I think that answers the question as to what your position is.

Mr. Fryer: Yes.

The Master: All right, you may continue with your direct examination.

Q. (By Mr. Geisler) Mr. Dimick, you may state why on that drawing, Complainant's Exhibit 6, you included the devices 90 and 91 in addition to 67?

A. When this lifting device was set up at the Dallas Machine & Locomotive Works, I was instructed to make a drawing showing the parts as they were on that lifting device, so I proceeded to do that; I followed out the lifting device as much as possible on a drawing of that sort in exact detail, and that made it necessary for me to include the bar 90 shown on the Exhibit 6 and the lug or engaging member on the rack as shown on that Exhibit 6. Then after having done that, made the drawing, had it all completed, it was necessary and I was instructed to put reference numbers on this

(Testimony of Henry Noel Dimick.)

drawing, and in order to do that correctly I then took the copy of the patent and I read through the patent, the various numbers, and noted them in a way which I believe is correct according to my reading of the patent, of the correct number of the various parts of the mechanism. Then when I had completed the reading of the patent as far as reference numbers [377] were concerned, and included in the patent description, I failed to find numbers to indicate a stop described in the patent as a means of stopping the lifting mechanism when the—or, in other words, it should be disengaging the clutch or throwing the clutch in neutral position and applying the brake when the load-lifting means had traveled a predetermined extent in either direction, and my interpretation of this action was that the members 90 and 91 were members supplied to terminate the movement of the load-lifting means to a predetermined extent in the upward direction, and without any instructions whatever I noted those two numbers, which do not appear in the patent description, on the drawing, so that I was able to write description of this particular Exhibit 6 in completeness.

**Q.** During the time you were employed at the plaintiff's plant, did they commence to manufacture hydraulic lifts?

**A.** My recollection of the exact happenings were that I went to work for the plaintiff just about the



(Testimony of Henry Noel Dimick.)

time that the first hydraulic lift was completed, and assisted in the construction of the second hydraulic lift carrier, and helped finish up the first one.

Q. Did you know the purpose of making hydraulic lifts?

A. Well, my understanding has been as an employe of the plaintiff that it was his idea that a hydraulic hoist or lift was considered one of the best means of lifting loads or raising heavy obstacles, a hydraulic lift or a jack or something similar that operated hydraulically was a very good means, at least, of lifting a load.

Q. What advantage did the hydraulic have, if any?

A. Well, the advantages were cited that there was not as much complicated mechanism, being principally cylinders and piping, and did not require a reversible clutch to operate this hydraulic lift, to furnish the pressure necessary to operate the hydraulic lift, and a positive means of controlling the flow of liquid, as well as an automatic means of stopping the flow of liquid by stopping the pump when a certain pressure had been established in [378] the hydraulic mechanism, and by those devices, or by that operation, rather, the flow of liquid and creation of the pressure to disengage the clutch, it was unnecessary then to have brakes or other automatic stops than a governor to stop the load-lifting means when it had traveled to the upper



(Testimony of Henry Noel Dimick.)

extent or the lower extent, and it was unnecessary to have a brake that would hold the load in any particular position, due to the fact that an operating valve installed integral with the piping of this hydraulic machine would stop the flow of liquid in either direction and hold the load in the desired position.

Q. Were you still employed at the plaintiff's at the time the manufacture of hydraulic lifts was discontinued?

A. Well, I may have to make a rather broad statement. I was employed by the plaintiff at the time that he decided to discontinue—or, not discontinue, but to manufacture a carrier other than a hydraulic lift, and he and I talked about it at various times——

Q. Who is he?

A. The plaintiff, Mr. Carl Gerlinger.

Q. The patentee?

A. Yes—and the last hydraulic carrier that I have any recollection of the Dallas Machine & Locomotive Works Building, or the last one that I helped construct or had anything to do with, was a machine that went to Australia, and in connection with the Dallas Machine & Locomotive Works and their agents in Australia I went to Australia with this machine, and just previous to my departure to Australia, why, I did some work on the first rack and pinion model carrier, or what is termed the

(Testimony of Henry Noel Dimick.)

RPF, but at the time I left for Australia, that machine was not completed. Some of the members were installed on the frame, and so on, but before I left I was familiar with what the machine was going to be——

Q. What do you have reference to, what that machine was going to be? What kind of a machine?

[379]

A. It was a rack and pinion Gerlinger carrier, rack and pinion lift similar in operation to the one shown here on Exhibit 6. Upon my arrival in Australia the machine was—the hydraulic machine was late in arriving—in other words, it arrived after I did—and I set the machine up there and put it in operation, and some time later I was employed as an engineer in Australia by Gunderson-Northworth, Proprietor, Ltd., which later became the Timber Transport & Storage Company, Proprietor, Ltd. I ordered through my employers—I have stated who they were——

Q. A little louder, so the Court may hear.

A. I ordered through my employers in Australia four of the new rack and pinion carriers known as the RPF model, and when they arrived, why, we put them in operation at the Timber Transport & Storage Company plant. So that this machine which I took to Australia, or which was the reason for my going to Australia, a hydraulic machine, was the

(Testimony of Henry Noel Dimick.)

last of the ones I actually had any experience with at the Dallas Machine & Locomotive Works.

Q. The last hydraulic?

A. Yes, the last hydraulic,—and the four rack and pinion machines, RPF model, which I ordered from the Dallas Machine & Locomotive Works, to be delivered in Australia, were my first view of the completed RPF model.

Q. Do you know why the hydraulic lumber carriers, hydraulic-lift lumber carriers, were discarded?

A. Well, the principal reason for that was that piping, regardless of whether it was steel or copper or some of the other types or materials, which are used for conducting or carrying fluid put through the hydraulic lift, were subject to leaks and would leak oil out on the frame and other parts of the machine, it would drip on lumber and damage lumber, and we found in some in- [380] stances, speaking of the Dallas Machine & Locomotive Works as a whole—that is, the people who were operating the machines and building them—found that in many instances drivers of carriers were incompetent in a mechanical way to keep this hydraulic lift operating satisfactorily, and one of the reasons was that they would let leaks accumulate and get worse, and I myself, at various times during the period while the Dallas Machine & Locomotive Works were

(Testimony of Henry Noel Dimick.)

manufacturing carriers with a hydraulic lift, tried to influence Mr. Gerlinger——

Mr. Fryer: Now, if your Honor please, I think that we have gone pretty far afield with this long dissertation about various things. I have been trying to see what materiality or relevancy it may have. Unless Your Honor particularly cares to hear this evidence we will object to it on the ground that it is wholly immaterial and irrelevant and no part of the plaintiff's opening case on any of the issues framed in the pleadings.

The Master: What do you claim for it?

Mr. Geisler: Well, Your Honor, they claim that because for a time hydraulic lifts were manufactured that we abandoned our invention.

The Master: Aren't you rather anticipating their defense?

Mr. Geisler: Well, they so charge right here.

The Master: I know, but aren't you anticipating their defense?

Mr. Geisler: That is true, but the points were made when cross examination came up——

The Master: If you want to anticipate the defense I shan't bar you from it.

Mr. Geisler: No. Very well, then I just want to explain through this witness why those hydraulic lifts were discontinued.

Mr. Fryer: All right, withdraw our objection, Your Honor.



(Testimony of Henry Noel Dimick.)

Mr. Geisler: The witness is yours.

Mr. Fryer: Have you concluded your examination? [381]

Mr. Geisler: Yes, sir.

The Master: Well, he didn't finish his answer—he said, “I myself at various times during the period while we were manufacturing hydraulic machines tried to influence Mr. Gerlinger”, and then there was an interruption. Influenced to do what?

A. I tried to influence him to——

Mr. Geisler: I will withdraw the question.

Mr. Fryer: May I have just a moment, if Your Honor please?

The Master: Yes, sir.

Mr. Fryer: Oh, that is right, the cross examination of this witness is to be deferred until we complete the cross examination of the witness Gerlinger.

The Master: That is the understanding. Anything further of this witness?

Mr. Geisler: No, Your Honor.

The Master: You will be excused temporarily. You will be back, however, tomorrow, because your cross examination will take place tomorrow, Mr. Dimick.

A. Thank you, Your Honor.

(Witness excused.)

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The Master: Will you call another witness.

Mr. Geisler: Mr. Ballantyne, take the stand, please.

## WALTER E. BALLANTYNE

was thereupon produced as a witness in behalf of the complainant herein, and, having first been duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Geisler:

The Master: State your name and address.

A. Walter E. Ballantyne, Dallas, Oregon.

Q. (By Mr. Geisler) What is your position with the plaintiff corporation? [382]

A. Secretary-treasurer.

Q. When was the corporation organized?

A. December 1st, 1919.

Q. Have you been holding the same position ever since? A. I have.

Q. Did you keep any shop records there?

A. I did.

Q. Did you keep records with regard to the work done on these carriers that have been testified to? A. I did.

Q. Now, by looking at your records, if you wish to refresh your memory that way, you may state when the first work was started on lumber carrier which is Plaintiff's Exhibit No. 1, identified by the last three numbers of the patent as 958?

A. Started in May, 1921.

Q. Do you know when that lumber carrier was taken over to a shop to be tested out?

A. Well, it was taken over about the latter part of July.

(Testimony of Walter E. Ballantyne.)

Q. What year? A. 1921.

Q. Where?

A. At the Willamette Valley Lumber Company in Dallas is where it was tested out.

Q. Do you know personally what happened with respect to that lumber carrier? A. I do.

Q. Will you state what occurred?

A. Well, we didn't find it very satisfactory. We had to bring it back and put on a new power plant and a gear——

The Master: Speak up so I can hear. You had to bring it back?

A. We had to bring it back and put on a new power plant and change the gear drive to a chain drive, and there were some changes made then in the lifting mechanism. [383]

Q. (By Mr. Geisler) Was anything else observed with regard to the workings of that number 1 machine? A. Not——

Q. I mean the original machine?

A. No, not on the original that I know of.

Q. I am referring now to the machine made like patent number 958. A. Well,——

Mr. Fryer: We object to that, if Your Honor please, on the ground that there is utterly no foundation laid; that that exacts an opinion from this witness, not shown to have had any knowledge or means of knowledge of the facts inquired about.

Mr. Geisler: The witness was right there. It

(Testimony of Walter E. Ballantyne.)

has been testified, and he has been here, talked about so much, that the first machine was taken back, that is to say, a machine made like the first patent,—the original patent, I will say, the last three numbers of which are 958, was taken back to the shop and made over. That is what Mr. Gerlinger testified. I am asking this witness whether he—he says he was there—if he knows anything about it.

Mr. Fryer: Nothing has been brought out to show that this witness has any knowledge of construction of machines or knowledge of the contents of any of the patents in evidence, Your Honor, and that is one of the grounds of my objection, lack of foundation.

The Master: Well, I think the objection is well taken upon the proposition that this witness has not yet been shown to have had any knowledge of Patent 1422958.

Q. (By Mr. Geisler) Well, are you familiar with the construction of that patent just referred to? A. I am.

Q. Have you during the number of years that you have been employed there by the plaintiff acquired any knowledge of machinery?

A. I have. [384]

Q. Did your duties require the examination of drawings and machine sketches, and so on?

A. Well, part of my work was along that line. I had to order all the material for the carriers, and



(Testimony of Walter E. Ballantyne.)

quite a bit of this material I had to draw my order from the blueprints even, and I had to be familiar with blueprints—while I am not a mechanical engineer, or anything that way, but I have a fair knowledge of blueprints, drawings.

Q. You have studied this patent, Plaintiff's No. 1, Exhibit No. 1, 1422958? A. I did.

Q. And are familiar with this construction?

A. Yes.

Q. You may state further if the machine which was built sometime prior to July, I believe, 1921, was or was not like this Plaintiff's Exhibit No. 1?

A. It was. Now, Plaintiff's Exhibit No. 1,—I would like to know what you mean by that.

Q. Plaintiff's Exhibit No. 1 is 1422958.

A. Yes.

Q. Now, what was done with that machine after it was built in the shop?

A. It was taken over to Willamette Valley Lumber Company, where they tried it out. As I stated before, it was not very satisfactory and they brought it back.

Q. Do you know why they brought it back?

A. Well, the power plant was not very satisfactory, and the gear drive was not satisfactory, and needed some improvements in the lifting mechanism.

Q. Do you know of your own knowledge what the improvements were that were made in the lifting mechanism?

(Testimony of Walter E. Ballantyne.)

A. Well, the only change that I know of, they changed some of the levers around. On account of the different construction of [385] the new power plant, that had to be changed somewhat. And then they found out they would need a brake on it.

Q. What was done with that machine when it was brought back from the Willamette Valley Lumber Company to the plaintiff's shop?

A. It was reconstructed, rebuilt.

Q. When was that rebuilding done?

A. Well, started right after they brought it back, and it was completed the latter part of September.

Q. What then was done with that machine?

A. It was sold to Willamette Valley Lumber Company at Dallas, Oregon.

Q. Was it operated then by the Lumber Company?      A. It was.

Q. Are you familiar with the plaintiff's Exhibit 2, which identifies the plaintiff's patent 1457025?      A. I am.

Q. You have studied that patent?

A. I have.

Q. And you feel you know its mechanical details?      A. Pretty fair, I think.

Q. Now, you may state whether that machine that was taken to the Willamette Valley Lumber Company's yard about October 1st, 1921, was or was not like this patent Plaintiff's Exhibit 2?

(Testimony of Walter E. Ballantyne.)

A. It was, substantially identical.

Q. State whether or not to your knowledge any further machines were afterwards built—that is to say, subsequent to October 1st, 1921—in the shop of the plaintiff similar to patent Plaintiff's Exhibit 2?

A. There were.

Q. When were those machines built?

A. The next one—or the first charges I have according to the records were October 4th, 1921.

Q. What shop number did you assign to that, or was it known by, in other words? [386]

A. Well, my records show it as G-10, but on the—the Court so far has been calling that machine number 2.

Q. Do you know anything about machine number three?      A. Yes.

Q. How was that built?      A. Just the same.

Q. Was there a machine number four built?

A. There was.

Q. When was that machine built?

A. Well, it was—machines numbers two and three were finished in February first, and then this other one, machine number four, was completed and delivered on April 1st, 1922.

Q. Was that machine the same or different from numbers two and three—number four?

A. It was the same.

Q. You may look at this photograph and state if you recognize—it is some place here, I haven't

(Testimony of Walter E. Ballantyne.)

got the number, your Honor. That is the picture with the men in it, the group of men.

The Master: I think it is numbered on the back, isn't it?

The Bailiff: I think you have got it there.

The Master: Twenty-nine.

Mr. Geisler: Twenty-nine?

The Master: Yes.

Q. (By Mr. Geisler): The bailiff will kindly show that to the witness that the Court has. I would like the other returned to me. Were you present at the taking of that photograph? A. I was.

Q. Do you identify some of the people that were there? A. I do.

Q. For example, looking at the righthand side, whom do you see there?

A. The righthand side, the first one is Carl F. Gerlinger, the patentee.

Q. A little louder. [387]

A. The first one to the right is Carl F. Gerlinger.

Q. Who is the next? A. That is myself.

Q. Looking at the left, who is the man standing with his elbows akimbo? A. Nels Anderson.

Q. When was this photograph taken?

A. Well, I can't fix the exact date, but just shortly prior to February 1st, 1922.

Q. Where?

A. It was taken in front of the plant of the Dallas Machine & Locomotive Works, Dallas, Oregon.



(Testimony of Walter E. Ballantyne.)

Q. What machines, referring to what was testified here to as numbers two and three, and so on—what particular machines does that photograph show?

A. It shows machines two and three.

Q. To whom were those machines two and three delivered?

A. To Cobbs & Mitchell Company. They were delivered at Independence and shipped up by rail.

Q. To what place? A. To Valsetz.

Q. Oregon? A. Yes, to Valsetz, Oregon.

Q. Now, I would also like you to identify these two machines— This is 29. Exhibit 30?

The Master: I assume that is it.

Q. State whether or not those are the same—include the same machine—one of them is the same machine—no, it is the same two machines as shown in Exhibit 29, in the photograph I hand you?

A. They are, yes.

Q. Do you know of your own knowledge when the plaintiff discontinued—or when the plaintiff commenced to manufacture hydraulic lifts?

A. I do. I kept the records. [388]

Mr. Geisler: Read that question back, please.

(The question was thereupon read.)

Q. (By Mr. Geisler): The question should be, began to manufacture hydraulic lifts. Do you know that? A. Yes, sir.

Q. Do you know when the plaintiff discontinued manufacturing hydraulic lifts? A. Yes.

(Testimony of Walter E. Ballantyne.)

Q. After that what kind of a lift did the plaintiff manufacture?

A. Rack and pinion lift, called the RPF.

Q. How many of those did you manufacture after you again commenced to manufacture mechanical lifts?

A. You mean after we quit the hydraulic?

Q. Yes. A. Ninety-five.

Q. How do you know that?

A. I have got the records. Do you want to see them?

Q. No, unless counsel wishes to see them. Have you a record charge with regard to the first work on carrier number 2 that we have been speaking about here? A. I have.

Q. When was that charge? A. What——

Q. On your records when was the first charge for labor, or whatever it might have been?

A. October 4, 1921.

The Master: He already testified to that.

Mr. Geisler: Yes, I think he has. I wasn't sure. To whom was the carrier number 4 sold?

A. To the Brighton Mills Company at Brighton Oregon.

Q. Can you tell us the cost of these lumber carriers? A. Do you mean the cost or the——

Q. The price at which you sell them.

A. The present carriers, do you mean, that we are manufacturing now? [389]

Q. Yes, with the mechanical lift?

(Testimony of Walter E. Ballantyne.)

A. They range from \$3,850 for the light models up as high as \$7,050 for the larger six-wheeled model.

The Master: Thirty-eight fifty to seven thousand fifty? A. Yes, sir.

Q. (By Mr. Geisler): Have you any knowledge as to when the plaintiff first became aware that the defendant was manufacturing lumber carriers—

A. I have.

Q. —which are infringed upon, we claim infringed upon, by the defendant's hoists?

A. I have.

Mr. Fryer: We object to that as grossly incompetent. Certainly this witness is not competent to pass upon the legal question of infringement of a patent or express opinions upon it. That is for the Court to pass upon.

The Master: The question was whether he knew when the patentee first became aware of a patent infringement.

Mr. Fryer: It assumes that fact, also.

The Master: It assumes the infringement, but I assume what counsel has in mind, the alleged infringement.

Mr. Geisler: The claimed infringement.

Mr. Fryer: It is improper in form for that reason.

The Master: Well, let's let it show that it is modified by the insertion of the word "claimed infringement".

(Testimony of Walter E. Ballantyne.)

A. May I have the question again, please?

The Reporter: (Reading) "Have you any knowledge of when the plaintiff first became aware that the defendant was manufacturing lumber carriers which are infringed upon, we claim infringed upon, by the defendant's hoists?"

Mr. Geisler: Which the plaintiffs claim were infringed upon.

A. In September, 1935.

The Master: It has now reached the hour of five o'clock, gentlemen. We will adjourn until ten o'clock tomorrow morning. [390]

(Whereupon, at 5:00 o'clock P. M., November 24, 1936, the hearing in the above entitled cause was adjourned until 10:00 o'clock A M., November 25, 1936. [391])

### WALTER E. BALLANTYNE

thereupon resumed the witness stand, and was examined and testified further as follows:

#### Direct Examination

By Mr. Geisler:

Mr. Geisler: Will the reporter please read the last question which was put to Mr. Ballantyne?

(The question referred to was thereupon read.)



(Testimony of Walter E. Ballantyne.)

Mr. Geisler: I will ask that the question be made more definite by referring specifically to the defendant Willamette-Hyster Company.

(The answer to the question just read was then read.)

Q. (By Mr. Geisler) What was the occasion of your attention being drawn to the lumber carrier manufactured by the Willamette-Hyster at that time?

A. Why, the Dallas Machine & Locomotive Works received a requisition from the Shevlin-Hixon Company. This requisition was dated about September 3rd, 1935,—

A. —and this was for two Gerlinger carriers equipped with swinging shoes; and about a week later we received a letter, dated September 11th, and in this letter they asked the Dallas Machine & Locomotive Works to guarantee Shevlin-Hixon against any suit for infringement of any patented device or unpatented, and at the same time that we got the order we understood that Willamette-Hyster had got an order for two machines also.

Q. From the same company?

A. From the Shevlin-Hixon Company; and we had previously sold them a number of carriers and other equipment and had never had this request for a guaranty before and it made us rather suspicious, so we started investigating to see if the design of our swinging shoe could possibly infringe on the patents that the Willamette-Hyster had on their

(Testimony of Walter E. Ballantyne.)

swinging shoes, and in this investigation we sent for copies of the Willamette-Hyster patent, and also had our General Superintendent go out and [392] make an examination and inspection of several of their machines, and during the course of this investigation, why, we found out the similarity of the machines.

Q. Whose machines?

A. Of the Willamette-Hyster and the Gerlinger patent in question. Then we took it up with our attorney to see if in his judgment there was an infringement.

Q. And that was the first intimation of any infringement that you had?      A. Yes.

Mr. Fryer: We object to leading the witness, your Honor.

Mr. Geisler: He already said so, at the first——

Mr. Fryer: It is objected to, also, on the ground that it is merely repetition, that it is plainly putting words in the mouth of the witness.

The Master: The question is leading.

Q. (By Mr. Geisler) Had you any other intimation of infringement on the part of the defendant Willamette-Hyster before then?

A. We did not.

Q. Now, with regard to the defendant Clark & Wilson Lumber Company, when did you first learn of their having any machine that you believe was an infringement upon the plaintiff's patent?

A. Well, it was about the same time. After we decided on this other, why, we knew that Clark

(Testimony of Walter E. Ballantyne.)

& Wilson had purchased several carriers from the Willamette-Hyster.

Q. What investigation then did you make further?

A. Our General Superintendent inspected the machines at the Clark & Wilson Company.

Q. And what did you find?

A. Found they were the same as the other machines they had investigated and in their judgment were thought an infringement.

Q. Now, state whether or not at any time previous to then you had any intimation or knowledge of infringement or use of any machine of plaintiff's patent by the Clark & Wilson Lumber Company?      A. We did not. [393]

Q. State whether or not there was any marking of the lumber carriers put out by the plaintiff?

A. There was. They had patent plates on them.

Q. What did the patent plates state?

A. Well, they stated the patent number, as soon as we had a patent number, as soon as we received our first patent. Previously they had "Patents Pending" or "Patent Applied For"; I wouldn't say now for sure which.

Q. You may state whether or not prior to—or outside of the defendant Willamette-Hyster Company here your patent rights of the patent here in suit have ever been questioned by anybody?

Mr. Fryer: Objected to on the ground of total lack of foundation, this witness not having been

(Testimony of Walter E. Ballantyne.)

shown to have the means or knowledge necessary to answer that question.

Mr. Geisler: He is the Secretary, Your Honor, and a corporation can only find, of course, things through its officers.

Mr. Fryer: But it has not been shown that he knows what is going on through all the four corners of the United States.

Mr. Geisler: Well, I am just asking him whether or not he knows of that.

The Master: If you ask it in that form the question may be answered.

A. We didn't know of any.

Mr. Geisler: You may cross examine.

Mr. Fryer: Cross examination is reserved until after the completion of the cross examination of the witnesses Gerlinger and Dimick.

The Master: Call your next witness.

(Witness excused)



United States  
Circuit Court of Appeals

For the Ninth Circuit. *v*

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DALLAS MACHINE & LOCOMOTIVE WORKS,  
INC., a corporation,

Appellant,

vs.

WILLAMETTE-HYSTER COMPANY, a corpo-  
ration, and CLARK & WILSON LUMBER  
COMPANY, a corporation,

Appellees.

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Transcript of Record

In Three Volumes

VOLUME II

Pages 407 to 804-b

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Upon Appeal from the District Court of the United  
States for the District of Oregon.

FILED

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JOHN LANDON WATERS

was thereupon produced as a witness in behalf of the complainant herein, and, having first been duly sworn, was examined and testified as follows: [394]

Direct Examination

By Mr. Geisler:

The Master: State your name and address.

A. John Landon Waters, at Dallas, Oregon.

Q. (By Mr. Geisler) What is your connection with the plaintiff in the suit?

A. I am the General Superintendent of the Dallas Machine & Locomotive Works.

Q. What has been your experience with regard to mechanical construction?

A. I have been—I was employed eight years for the Oregon State Highway Department, previous to eight years with the Dallas Machine Works. Three years prior to that I was with Vick Brothers Garage in Salem, Oregon.

Q. What experience have you had with the reading of patents and studying of inventions described by patents?

A. During the time that I have been with the Dallas Machine & Locomotive Works I have assisted in the applications for patents procured by that company.

Q. Have you studied the patent here in suit, Plaintiff's Exhibit Number 2?      A. Yes, sir.

Q. And are you familiar with it?

A. Yes, sir.

(Testimony of John Landon Waters.)

Q. Have you studied the booklet put out by the defendant under the title "Service Manual"?

A. Yes.

Q. The defendant Willamette-Hyster Company, I mean? A. Yes, sir.

Q. Are you familiar with the construction which is shown in the manual, with regard to the mechanism provided for the raising and lowering of the lumber carrying devices and the control of such devices? [395] A. Yes, sir.

Q. Did you have a drawing made, an enlarged drawing, of those devices, Mr. Waters?

A. Yes.

The Master: Well, is it admitted that the Willamette-Hyster Company is merely a changed name of Willamette-Ersted Company?

Mr. Fryer: Yes, it is so alleged in the pleadings and we don't question that, but each company puts out its own—but that organization has at different times put out different circulars and different literature, and they are not all identical.

The Master: Well, I would take it that the defendant ought to be familiar with its own literature.

Mr. Fryer: Oh, we are, your Honor.

Mr. Geisler: Well, I will proceed with the examination, then?

The Master: All right.

Q. (By Mr. Geisler) I show you here a pamphlet entitled "Service Manual", put out by the defendant Willamette-Hyster Company. Have you seen that Manual before? A. Yes, sir.

(Testimony of John Landon Waters.)

Mr. Fryer: We have no objection to the Service Manual presented to the witness by counsel, and we understand it to be offered in evidence by plaintiff. If not, we would like to offer it ourselves.

Mr. Geisler: It will be offered by the plaintiff in evidence. I ask that it be received and marked now.

The Master: It becomes Complainant's Exhibit number 32.

(Said Service Manual of Willamette-Hyster Company was thereupon received in evidence and marked Complainant's Exhibit 32.)

Q. (By Mr. Geisler) Now, Mr. Waters, have you studied the devices which are shown on pages 4 and 5 of this Exhibit 32? A. Yes, sir.

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Q. Have you compared that device as shown in these drawings with the plaintiff's patent?

A. I have.

Q. Can you tell us by referring to the devices shown and described in the Service Manual what if any connection or bearing they have on the plaintiff's patent?

A. May I have this on the stand, also, so we can refer to the two of them together?

The Master: By the way—I didn't get it—is that Willamette-Ersted or Willamette-Hyster?

A. Willamette-Hyster. Do you wish that I go through the two of them together, or compare them one with the other?

(Testimony of John Landon Waters.)

Q. (By Mr. Geisler) No. Be seated; I want to ask you another question. Have you examined the Hyster put out by the—or lumber carrier, I meant to say, put out by the defendant Willamette-Hytser Company and which the plaintiff claims is an infringement upon its patent?

A. Do you mean the carrier, the complete carrier?

Q. Yes. A. Yes, I have.

Mr. Geisler: Do these drawings, which are enlargements—those are photostatic enlargements. You will concede that, will you?

Mr. Fryer: Yes, we concede that the structures shown in the black lines in the two charts before the witness truly and correctly represent the construction found in the defendant Clark & Wilson's Willamette-Hyster elevator.

Mr. Geisler: May I have those marked for identification, your Honor?

The Master: Drawing number 1 becomes Complainant's Exhibit 33. [397]

(The enlarged drawing referred to was thereupon marked for identification Complainant's Exhibit 33.)

The Master: Drawing number 2 becomes Complainant's Exhibit 34.

(The enlarged drawing referred to was thereupon marked for identification Complainant's Exhibit 34.)

Q. (By Mr. Geisler) Now, look at Exhibits 33 and 34 and tell us whether those exhibits show pic-



(Testimony of John Landon Waters.)

torially the hoisting mechanism and control thereof substantially as incorporated in the lumber carrier put out by the Willamette-Hyster Company and charged to infringe the patent in this suit?

A. Yes, I think they do.

Q. Are they accurate drawings or——

A. They are diagrammatic drawings, or schematic drawings, I should say.

Q. Now, having reference to the elements of the claim here in suit—in the first place, the first element, or claim 4, is a lumber carrier comprising the claim. As to that, of course, there is no question. Now, take the next element——

Mr. Fryer: Is that part of your question, Mr. Geisler, or is that a statement by counsel?

Mr. Geisler: Well, I wondered if there is any question. You don't question the fact that the lumber carrier contains a claim, do you?

Mr. Fryer: Oh, no. I didn't know you were addressing a question to me. I thought you were interrogating the witness, but if you are asking me I will concede that both machines contain a frame.

Mr. Geisler: Yes, that is what I meant. Thank you.

Q. (By Mr. Geisler) Now, referring to the next element, the load-lifting means marked therein: Now, will you, with reference to the drawings plaintiff's Exhibits 33 and 34, point out those load-lifting means? [398]

A. Well, the drawings in their entirety show that they all pertain to the load-lifting means, com-

(Testimony of John Landon Waters.)

prise the load-lifting means.

Q. I see. Well, explain the parts by the reference characters shown on those drawings, and also by comparison with similar devices shown in plaintiff's patent drawings and specifications.

A. The drawing number 1 indicates the reversible clutch which transmits the power and motion from the source of power to the load-lifting means.

Q. Please refer to the——

A. Referring to the drawing number 1, it comprises—this portion colored orange comprises the clutch, reversible clutch.

Q. Pardon me, refer to the letters which are given on it.

A. Well, the letters,—that comprises letters T, C, P, F, Q, M, I, A and S. All those letters refer to the hoist clutch, the different parts of the hoist clutch itself as a unit.

Q. Now, please explain the operation, the construction and operation, of that hoist clutch.

A. In operation, in order to engage the clutch the lever HL in drawing number 2 is moved in either direction, depending on the motion required. It in turn through the levers and arms IS and IL and L and FSL rocks the frame M by means of shaft S.

Q. Now, before you go any further would you please show similar parts that you refer to in the patent in suit, by letters——

A. The corresponding marks on Patent number 1457025 are indicated by numbers 47, which indicates the clutch, number 70, which indicates the

(Testimony of John Landon Waters.)

hand lever, and number 48, which indicates the controls from the land lever to the clutch. That takes us up—those parts are equivalent to the parts up including everything in red and everything shown in orange here.

Q. (By Mr. Geisler) Now, proceed, and from time to time show the parts in the patent which in your opinion are similar to the parts shown in these drawings, Exhibits 33 and 34. [399]

A. When this lever HL has been moved to engage the clutch it simultaneously releases the brake indicated by letters K, U, O, E, D, BR, B, N, and J.

Q. Explain what you mean by “releases the clutch”. I mean the movement which takes place.

The Master: Releases the brake, wasn't it?

A. We release the brake.

Mr. Geisler: I mean release the brake.

A. The operation of the brake is controlled by the letters B, N, J and B, and also E, U being a support or guide for this number E. When the letter HL has been moved it moves the cam J, causing the brake or this ball M to be moved from the groove, from the cam, thus causing this shaft BR to move toward the clutch.

The Master: The clutch?

A. Yes. That pivots on the point shown as—there is no number given, but it pivots on this point and releases a brake——

Q. (By Mr. Geisler) What pivots on the point?

A. The arm U.

Q. Proceed, please. What is the effect, then, of pivoting on the——



(Testimony of John Landon Waters.)

A. Well, that,—I say when the clutch is engaged that disengages the brake, allowing a movement of the clutch in the lift mechanism. When the lift mechanism has reached its limit of travel in either direction, the parts GB, being a rod upon which stops LS are fastened, contact the part EB, which is secured to the screw, a lifting screw, causing the rod GB to return the lever HL to its neutral position, thus disengaging the clutch and applying the brake by the means of the parts mentioned before.

Q. What is the member that engages with those stops LS on the rod GB?

A. I beg your pardon, you mean which is the member that EB—

Q. Yes. [400]           A. EB contacts LS.

Q. EB is the part which contacts with the part LS?           A. Yes.

Q. And how is that part EB moved?

A. It is moved by the nut on the lifting screw of the hoist mechanism. There is no number, identification number, on the screw in this drawing.

Q. You might mark it an identification number with a pencil, will you, please.

The Master: Mark it D—is there a D on that?

A. Yes, there is.

Mr. Fryer: You might give it a number.

The Master: All right, give it 1, number 1.

Q. (By Mr. Geisler) Is that on the screw that—           A. That is the nut.

Q. Now, you might mark one—

A. Do you wish one on the screw also?



(Testimony of John Landon Waters.)

Q. If you please. A. Number 2?

The Master: Yes.

Q. (By Mr. Geisler) Now, state whether or not that screw numbered 2 is rotated?

A. Yes, the screw number 2 is rotated when the clutch is applied.

Q. What rotates it?

A. That is rotated by means of a chain, which is not shown on the drawing, but operates on a sprocket—it has no number, either—there is a chain operates from a sprocket to a sprocket connected to the screw. Those parts are not shown on the drawing.

Q. What is the source of power which is applied to that screw 2?

A. I don't quite understand your question.

Q. What is the source of power, by what source of power is that screw 2 operated?

A. By the power transmitted from the source of power through [401] this clutch, reversible clutch.

Q. I see; it must go from the source of power through the clutch to the load-lifting screw. And what raises and lowers the load-carrying rods?

A. The nut 1 is secured by a linkage to bell lever Z, which is in turn connected with the lifting shoes by the rod indicated but no number being shown.

Q. Did you make any photograph of the defendant Hyster machine, lumber carrier, which shows similar parts? Q. Yes, sir.

(Testimony of John Landon Waters.)

The Master: Am I right in assuming that screw 2 in drawing 2 is horizontal?

A. Yes, sir.

The Master: And it merely serves to actuate the leverage Z?

A. Yes, sir.

The Master: Which lifts the shoe?

A. Yes, sir.

The Master: Or lowers the shoe, depending upon which way——

A. That is right.

The Master: And in lifting the shoe that lifts the load, or supports the load?

A. Well, lifting the shoe supports the load being lifted.

The Master: That takes the place, then, of the rack and pinion in your device?

A. Yes, sir.

Q. (By Mr. Geisler) Identify what that is, that photo. Please show it to him.

A. That is a photograph of the machine in question, Willamette-Hyster's.

Mr. Geisler: I offer that as evidence, your Honor.

Mr. Fryer: I think there is not sufficient foundation yet, your Honor, to show what particular machine this is.

The Master: I think you are right. I will mark it for identi- [402] fication, but counsel may further examine.

(Testimony of John Landon Waters.)

(The photograph referred to was thereupon marked for identification Complainant's Exhibit 35.)

Q. (By Mr. Geisler) Of what machine is that a photograph, Mr. Waters?

A. Do you mean the location of the machine, where we obtained——

Q. No, what particular machine did you take that photograph of?

A. That is a photograph of a machine located at Chambers Lumber Company, at Cottage Grove.

Q. Do you know, have you any idea as to who was the manufacturer of that machine?

A. Willamette-Hyster are the manufacturer. I believe there is a name plate on the machine indicating such.

Q. Now, state whether you compared that with the Service Manual here of the defendant Hyster company?

A. Yes, sir, I have.

Mr. Fryer: We have no further objection to the photograph, your Honor.

The Master: It may be received as complainant's Exhibit 35.

(The photograph heretofore marked for identification Complainant's Exhibit 35 was thereupon received in evidence.)

Q. (By Mr. Geisler) Now, please state whether that photograph shows the bell crank Z that you have referred to?

(Testimony of John Landon Waters.)

A. Yes, this shows the bell crank Z very plainly. That shows the connection of this rod with the lifting shoes.

The Master: The rod on the lower end of Z?

A. Yes.

The Master: Attached to the lower end of Z.

Mr. Geisler: You might give that rod for identification a number, if the Court will permit that,—number 3.

A. Three.

The Master: Is there any objection to marking on this photograph those things which I have——

Mr. Fryer: None whatever. [403]

The Master: This may go to the District Court, who would not have the opportunity of hearing the witness.

Q. (By Mr. Geisler) Will you describe the operation of the clutch and the application of the brake during the raising and lowering movements of the——

A. On movement of lever HL the clutch, reversible clutch, is engaged by means of the various levers before mentioned indicated in red. When they are in an engaged position the brake mechanism as before described shown in purple is disengaged, allowing free movement of the lifting device. Upon reaching the limit of travel in either direction the parts as indicated here in yellow, these that we described a few minutes ago, return this lever HL to a neutral position, thus returning the clutch to



(Testimony of John Landon Waters.)

a neutral position, disengaging the clutch and applying the brake simultaneously.

Q. Then please state what in your opinion the clutch-operating and brake-applying devices correspond with as far as the plaintiff's patent is concerned?

A. I believe I have explained as far as the manual control is concerned, so in the—from the engaged position, after the lever 70 as indicated in our patent 1457025 is in the engaged position the load-lifting means are connected with the source of power by means of the clutch. When they have reached their limit of travel the lever,—or, rather, the stop 65 shown on the patent contacts the bell lever 66, causing arm 64 to pivot on point 63, thus moving the opposite end of the arm 64, which is numbered 48, causing the clutch to return to a neutral position and causing lever 74 and 76 to apply the brake, which is indicated in Figure 4 by the number 77 as being the brake member 66 contacts, exerts pressure on the shaft 77, causing the brakeage on that shaft.

Q. State specifically what the part marked LS and LS, which [404] I understand you have designated stops, in drawing number 2, plaintiff's exhibit 34, are the equivalent of in the plaintiff's patent?

A. Yes, they are the equivalent mechanism.

Q. Of what?

A. They perform the same function—

Q. As what part?

(Testimony of John Landon Waters.)

A. As our part 65, and, also, I hadn't fully described this yet on the crossbar 67 of the patent '025; when a load contacts this crossbar 67 it causes that bar to pivot on point 68 shown in Figure No. 1, thus causing cam 69 to return the lever—to move lever 48, thus returning the clutch to a neutral position.

Q. Then, as I understand, one of those stops LS performs the same duty as that part 65-66?

Mr. Fryer: Now, if Your Honor please, I am not objecting to the leading character of the examination here—it may save time—but I wish to call attention to it so that I may be afforded the same latitude in the examination of our witnesses for the same purpose of saving time.

The Master: Proceed.

A. Would you state that question again?

(The question was thereupon read.)

A. Yes. 65 and 66, yes.

Q. (By Mr. Geisler) Now, is there a part in the defendant's device shown in this exhibit 34 which performs the same duty as the part 67 of the plaintiff's patent? Look at the patent and see.

A. Well, they are both—yes, there is a stop, one of the stops, LS, causes the load-lifting means to disengage in the upward travel of the load-lifting means. 67 performs the same function. It throws the mechanism, returning the clutch to the neutral position upon the upward travel of the load-lifting means.

(Testimony of John Landon Waters.)

Q. Now, recapitulating with regard to the elements which are [405] set forth in the claim 4 of the plaintiff's patent in suit, do you find in the defendant's lumber carrier as schematically illustrated by these drawings, plaintiff's exhibits 33 and 34, load-lifting means mounted in such a carrier?

A. Yes, sir, we do.

Q. Do you find therein means for transmitting motion from a source of power to the load-lifting means?

A. Yes, sir.

Q. Comprising the clutch?

A. Yes, sir.

Q. That can be set in neutral position or to cause the load-lifting means to move in either direction?

A. Yes, sir.

Q. Do you find therein means for manually moving the clutch to operative position?

A. Yes, sir.

Q. Do you find therein means for automatic—automatic means for moving the clutch to neutral position upon the movement of the load-lifting means to a predetermined extent in either direction?

A. Yes, sir.

Q. Do you find therein a means for braking the transmitting means whenever the clutch is moved to neutral position?

A. Yes, sir.

Q. (By Mr. Geisler) Now Mr. Waters, I am asking you also to state specifically whether the elements of the claims that I shall enumerate were found by you in the machine manufactured and sold by the Willamette-Hyster Company?

A. Yes, they are all there.

(Testimony of John Landon Waters.)

Q. I will ask you specifically, did you find a machine load-lifting means mentioned therein?

A. Yes. [406]

Q. Did you find therein means for transmitting motion from a source of power to the load lifting means comprising a clutch? A. Yes, sir.

Q. That can be set in neutral position or to cause the load lifting means to move in either direction?

A. Yes, sir.

Q. Means for manually moving the clutch to operative position? A. Yes, sir.

Q. What are those means for moving the clutch to operative position?

A. The means for moving the clutch to operative position comprise the parts indicated in red on drawing No. 2.

Q. Did you find in that particular lumber carrier automatic means for moving the clutch to neutral position upon a movement of the load lifting means to a predetermined extent in either direction?

A. Those means are indicated in the portion colored yellow.

Q. Well, did you find those?

A. Yes, sir, I did.

Q. Did you find means for braking the transmitting means whenever the clutch is moved to neutral position? A. Yes, sir, I did.

Q. Did you examine the lumber carrier which is being operated at the Clark & Wilson Lumber Yard? A. Yes, sir.



(Testimony of John Landon Waters.)

Q. Now with reference to that particular carrier there, were there any identification marks on it, as to who made it?

A. Yes; there was a name plate indicating the manufacturer.

Q. By whom?

A. Willamette-Hyster Company.

Q. Now with reference to these particular elements that I just enumerated with reference to claim 4 of the patent, state whether or not all those elements were included in that machine, or if any of them were not included state which were not included. [407]

A. They were all included.

Q. I will ask you to look at this photo and state who made it and what it represents.

A. I made this photograph from the lifting mechanism from one of the earlier carriers manufactured, I believe the fourth machine manufactured by the Dallas Machine & Locomotive Works.

Q. Was the drawing, Plaintiff's Exhibit No. 6—would you kindly show that to him, Mr. Bailiff—made from this lifting mechanism that you referred to?

A. Yes, sir. The drawing No. 6 was made from the elements or from the parts shown in this photograph.

Q. What is that a close-up view of particularly?

A. It is a close-up view of the clutch and the automatic brake and a portion of the controls.

Mr. Geisler: We offer that in evidence.

Mr. Fryer: I have no objection.

(Testimony of John Landon Waters.)

The Master: It will become complainant's Exhibit No. 36.

(The photograph referred to was thereupon received in evidence and marked Complainant's Exhibit 36.)

(A detail sketch was thereupon received in evidence and marked Complainant's Exhibit 37.)

Mr. Geisler: You may cross examine.

Mr. Fryer: We reserve cross examination of this witness until the conclusion of the cross examination of the witness Gerlinger.

Mr. Geisler: Mr. Gerlinger is now here, your Honor.

The Master: You may be excused for the time being, Mr. Waters. Mr. Gerlinger, take the stand.

(Witness excused.)

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### CARL F. GERLINGER

thereupon resumed the stand as a witness in behalf of the complainant herein and, having been previously sworn, was examined and further testified as follows: [408]

#### Cross Examination

By Mr. Fryer (continued):

Q. Do you recall two hydraulic machines which we were talking about at the conclusion of your cross examination which had been sold by the plain-

(Testimony of Carl F. Gerlinger.)

tiff to the defendant Clark & Wilson Lumber Company?      A. Yes, I do.

Q. When your company sold these two hydraulic carriers to the defendant Clark & Wilson Lumber Company, did you learn anything about the lumber carriers which the Clark & Wilson Lumber Company was then using?      A. No.

Q. You didn't know whether or not they had ever used any lumber carriers before when you sold them those two hydraulic carriers; is that true?

A. Well, I even don't remember that, even if they had any carrier before.

Q. After you sold them the two hydraulic carriers, which I believe you stated was some time in 1923 or 1924, did you ever after attempt to sell Clark & Wilson Lumber Company any further carriers?      A. No, no, not for a long while.

Q. The defendant Clark & Wilson Lumber Company, according to your understanding, is a fairly large size lumber concern near Portland?

A. Yes.

Q. They were a pretty good prospective customer for your carriers?

The Witness: Let me get that, please.

(Last question read.)

A. I wouldn't say that.

Q. You didn't consider Clark & Wilson Lumber Company a good customer for any of your carriers at any time after you sold them your two hydraulic carriers; is that correct?

A. That is correct, yes. [409]

(Testimony of Carl F. Gerlinger.)

Q. So that you never went back to them after selling them these two hydraulic carriers, with any attempt to sell them any further carriers; is that true?      A. Not personally, no.

Q. No one in your company ever did that, either, did they?      A. Oh, yes; yes; yes.

Q. Oh, they did? At what time?

A. I couldn't tell you.

Q. Well, how do you know that anyone in your company did try to sell Clark & Wilson Lumber Company, then?

A. Well, I know there were ones, when they would go down they would sure call on them.

Q. And can you recall the first instance in which some one from your company went to call on the defendant Clark & Wilson Lumber Company to sell them a lumber carrier after they purchased two of your hydraulic carriers?      A. No.

Q. How long ago was it, roughly, would you say?

A. Oh, I couldn't say; I couldn't say. I just make a guess at it.

Q. Well, what is your best guess?

A. Oh, a year, about a year ago. That is just a guess, about a year ago—about a little bit over a year.

Q. You never at any time during your acquaintance with the Clark & Wilson Lumber Company, occasioned by your selling them two hydraulic carriers, gained any knowledge of the fact that the defendant Clark & Wilson Lumber Company was



(Testimony of Carl F. Gerlinger.)

using Ross carriers at its plant near Portland, did you?

A. I know they used Ross carrier later on, after they bought the hydraulic.

Q. How did you come to know that?

A. Well, through the men reporting it to me.

Q. "Through the men reporting it to me." What is the first occasion that you recall when any of your men reported to you that [410] defendant Clark & Wilson Lumber Company was using Ross carriers at its plant?

The Witness: Read me this question, please.

(Last question read.)

A. Oh, after—I say after we, a year or two after we sold the carriers, the hydraulic carriers to them.

Q. Who was it that reported the fact to you a year or two after Clark & Wilson bought your hydraulic carriers that they were using Ross carriers at their plant?

A. I couldn't say that.

Q. When the fact was reported to you a year or two after Clark & Wilson bought your hydraulic carriers that that company was using Ross carriers, did you make any effort to see the construction of those Ross carriers? A. No.

Q. Did you have anyone report to you anything concerning the construction or operation of those Ross carriers in use by defendant Clark & Wilson Lumber Company at that time? A. No.

Q. Is it your testimony that no one ever reported to you anything concerning the construction and

(Testimony of Carl F. Gerlinger.)

operation of the Ross carriers in use by the defendant Clark & Wilson Lumber Company at or after the time that you sold Clark & Wilson your hydraulic carriers?

A. Oh, I wouldn't say that, but I don't remember.

Q. As a matter of fact, Mr. G. A. Grab, who was then working for you, called your attention to the fact that Clark & Wilson were using Ross carriers, didn't he?

A. That might be true, but I don't remember he did.

Q. And it is also true that at the time that your two Ross carriers, your two hydraulic carriers, were sold to Clark & Wilson Lumber Company Mr. Grab, then in your employ, called your attention to those Ross carriers, pointed out to you that they contained upper and lower automatic limit stops and automatic [411] brake, and inquired whether or not such machines were not an infringement of your patent in suit; is that true?

A. That is not true.

Q. Mr. Grab never made any such statement to you at any time; is that right?

A. No.

Q. When news of the use by defendant Clark & Wilson of Ross carriers was communicated to you, you were sufficiently familiar with your competitor's machine known as the Ross carrier to know that that machine contained automatic upper and lower limit stops and an automatic brake for the load lifting means; is that true?

(Testimony of Carl F. Gerlinger.)

A. No, I didn't know it.

Q. When did you first learn that the Ross carriers contained automatic upper and lower limit stops for the lifting means and an automatic brake?

A. In 1935.

Q. And the Ross carrier has been sold in competition with your carriers ever since 1922 or '3 and you never learned until 1935 that any of those carriers contained automatic upper and lower limit stops and brakes; is that true?

A. That is true.

Q. You know the construction of Clark & Wilson carriers at this time, do you?

A. Fairly well.

Q. I show you a group of three photographs and ask you to state whether or not you recognize the machine appearing thereon as one of the Ross lumber carriers which you have been talking about?

A. Yes, they are Ross carriers.

Mr. Fryer: I now ask to have marked for identification the three photographs identified by the witness in the order of the next exhibits, 38, 39 and 40; or it has been suggested they be marked 38-A, B and C, perhaps, since they are all one machine.

[412]

The Master: They will be so marked.

Mr. Fryer: I am handing your Honor copies of each of the Exhibits 36-A, B and C, arranged so that you may place them in this folder, which I shall now hand you, in order that you may have a complete copy of the exhibits as they go in.

(Testimony of Carl F. Gerlinger.)

The Master: The exhibits 38-A, B and C have been marked for identification.

(The three photographs were thereupon marked for identification Respondents' Exhibits 38-A, 38-B and 38-C, respectively.)

Q. (By Mr. Fryer) Will you now look at the photographs of the Ross carrier, Exhibits 38-A, B and C, and state whether the mechanism shown in red on those photographs is what you understand is contained in that machine to move the clutch to neutral whenever the load lifting means reaches a predetermined position in either direction.

A. I wouldn't say that. That don't show plain enough here.

Q. Do you know what the automatic stop mechanism of the Ross carrier looks like?

A. Look like; yes, about.

Q. Well, can you state whether the parts colored red on the photographs——

A. Yes, it looks like it.

Q. Exhibits 38-A, B and C— A. Yes.

Q. Are the automatic stop mechanism of the Ross carrier?

A. Well, I wouldn't say. It look like it.

Q. Now will you state whether the parts on the photographs, Exhibits 38-A, B and C, which are colored orange, look like what you understand to be the automatic brake of the Ross carrier construction.



(Testimony of Carl F. Gerlinger.)

A. I wouldn't say that is the automatic—I mean that is the screws and the shaft, what I see in orange. [413]

Q. I call your attention to the photograph 38-C and the orange drum and brake band appearing on that photograph, together with the orange colored linkage moving to the clutch actuating lever and ask you to state whether that orange colored structure is what you understand is employed in the Ross carrier for automatically applying the brake?

A. That don't show close—that doesn't show close enough to tell; that is, if this works automatic.

Q. You do understand, however, that the Ross carrier contains a brake which is automatically applied?

A. Yes.

Q. When the clutch is placed to neutral; is that true?

A. That is true on the last model; I mean the last one what I saw.

Q. Was that sort of a brake mechanism lacking or missing in any Ross carrier which you have seen?

A. Well, I didn't see many; I didn't inspect just—personally I didn't inspect more than two or three.

Q. Of the two or three Ross carriers which you have inspected, which was the first one that you recall inspecting?

A. I look one—the first Ross carrier I look at, it was back in 1919.

Q. Was that a straddle truck?

A. That was an electric carrier, yes.

(Testimony of Carl F. Gerlinger.)

Q. It was a straddle truck for hauling lumber?

A. Yes, electric carrier.

Q. What sort of motive power did it have; electric motor?

A. Electric motor and storage battery, yes.

Q. Where did you inspect that Ross carrier in 1919?

A. At Portland here.

Q. In Portland, Oregon?

A. Yes.

Q. Now what Ross carrier is the next one which you say you inspected? [414]

A. Well, I couldn't say that, what the next one.

Q. After seeing this one in 1919 in Portland, you saw some others subsequent to that time?

A. Yes.

Q. But you don't remember when; is that it?

A. I saw lots of them just go by but I didn't inspect them.

Q. You saw them going by in the various lumber yards?

A. Yes, like the Eastern & Western or another mill, but I didn't inspect them.

Q. How close were they to you when they went by you, driving by on the street?

A. Oh, just drive by and——(witness pauses)

Q. Referring to the defendant **Clark & Wilson's** Willamette Carrier, which you state you believe infringes claim 4 of your patent in suit, did you examine a circular in connection with that machine in order to come to that conclusion?

(Testimony of Carl F. Gerlinger.)

A. No. I went to Portland with Mr. Waters, our General Superintendent, in September, about the end of September, 1935.

Q. If I correctly understand your previous testimony, you stated that you learned the construction of the Willamette-Hyster's machine by the inspection of circulars and also by the inspection of the machine. Now do you recall what circular you referred to in your testimony there?

A. The manual.

(Mr. Fryer indicated a book to the witness)?

The Witness: Yes.

Mr. Fryer: May the witness be shown Exhibit 37, please, the manual, of the Willamette-Hyster—32, rather.

Q. I show you Plaintiff's Exhibit 32 and ask you to state whether or not that is the manual which you refer to as the one which showed you the construction of the Willamette-Hyster machine.

A. Yes.

Q. And I suppose that the achematic drawings or illustrative [415] drawings on pages 4 and 5 of that circular is the part of the circular which you examined to get a clear idea of how Willamette-Hyster's stops and brake operated; is that true?

A. No. I examined the machine first.

Q. Did you also examine the drawings on pages 4 and 5?           A. Yes.

Q. Of the manual?           A. Yes.

Q. Looking at those drawings on pages 4 and 5 of the manual, Exhibit 32, did you also come to the

(Testimony of Carl F. Gerlinger.)

conclusion that the structure shown thereon infringed claim 4 of your patent?      A. Yes.

Q. Is it your understanding of the operation of the mechanism shown on pages 4 and 5 of the manual, Exhibit 32, that that mechanism will stop the movement of the load lifting means in either direction automatically, irrespective of whether there is any load in the machine?

The Witness: Will you repeat that again, please.

(Last question read.)

A. Yes.

Q. The mechanism shown in the drawings on pages 4 and 5 of Plaintiff's Exhibit 32 has no part in it which must be engaged by the load and pushed upwardly in order to push the clutch into neutral, has it?

The Witness: Let me get that, please.

(Last question read.)

A. It would have the same action.

Mr. Fryer: I know that may be your opinion, but I want you to answer the question, and I will ask to have it read to you again and see if you can answer it "yes" or "no" and then make any explanation you wish.

(Last question read.)

A. I would say yes.

Q. Will you point out that part, please, in the drawings on [416] pages 4 and 5 of Exhibit 32.

A. If you have a load and you raise a small load it will hit that LS with EB and stop it.



(Testimony of Carl F. Gerlinger.)

Q. You haven't answered my question, which was this: Point out in the drawings on pages 4 and 5 of Exhibit 32 the part which is struck by the load and pushed upwardly in order to throw the clutch into neutral.      A. No, that don't.

Q. There is no such part?      A. No.

Q. In the drawings on pages 4 and 5?

A. No.

Q. In Exhibit 32?      A. No.

Q. Is there?      A. No.

Q. Now what are the parts in the machine shown on pages 4 and 5 of Exhibit 32 which lead you to the conclusion that that mechanism contains the combination of your claim 4?

A. The clutch, automatic brake, and automatic stops.

Q. So that you have in these drawings, then, according to your opinion, on pages 4 and 5 of Exhibit 32, everything that you need to find in a construction in order to find the invention of your patent; is that your idea?

A. My own idea is that there is same function in this construction than it is in claim 4.

Q. And you come to that conclusion by inspecting the parts which you see in pages 4 and 5 of Exhibit 32?

A. Yes; and by inspecting the machine.

Q. Well, are there any parts which you consider a part of your invention which you don't find on pages 4 and 5 of Exhibit 32?      A. No.

(Testimony of Carl F. Gerlinger.)

Q. They are all there, in other words?

A. Well, no—yes, that is right. [417]

Q. Your answer is “That is right”?

A. That is right.

Q. Any mechanism in your opinion or any lumber carrier which contains the parts shown on pages 4 and 5 of Exhibit 32, contains the invention of your patent; is that it?

The Witness: Pages 4 and 5 of 32?

The Master: That is the one you have in your hand.

The Witness: Oh. I *want* say yes.

Q. (By Mr. Fryer) I show you a drawing of a friction hoisting clutch and drawings of a control mechanism having upper and lower limit stops and ask you to state whether you are able to find the invention of your patent in the mechanism shown on those drawings.

A. I find the reversible clutch with brake, but I fail to find all the limit stop. If all the elements are here and would go on a carrier I say infringed, but I can't see all the—I can't find them. If they are pointed out to me more——

Q. (By Mr. Fryer) I will see if I can help you on that, Mr. Gerlinger, by calling your attention to the parts numbered 10451, 10452, 10451 and 10450 and connected linkage on the document before you, and ask you to state if that facilitates you in any way in answering the question?

A. There is one——

(Testimony of Carl F. Gerlinger.)

The Master: If you are going to speak, Mr. Gerlinger, speak out loud enough so the reporter can get it. I am just trying to see what counsel is referring to.

Mr. Fryer: I beg your pardon, Your Honor, did I indicate to you the parts I was referring to?

The Master: Yes, I have got the parts.

A. If that goes on a lumber carrier, I say yes.

Mr. Fryer: I will now ask to have marked for identification the two documents referred to by the witness as defendants' ex- [418] hibits next in order for identification. They will be 39 and 40.

The Master: 39 and 40.

(The drawings referred to were thereupon marked for identification Respondents' Exhibits 39 and 40.)

Q. (By Mr. Fryer) It is your understanding, I suppose, that the invention of your patent can be found in mechanisms which are not made in exactly the same form as that shown in the drawings of your patent in suit, is that true?

A. But the principles are there.

Q. (By Mr. Fryer) In other words, is it your understanding that the invention of your patent in suit can be found in mechanisms which differ in form from the mechanisms shown in your patent?

A. In mechanical form, yes.

A. (By Mr. Fryer) You are aware that prior to the commencement of this suit Willamette-Hyster Company, one of the defendants, was manufactur-

(Testimony of Carl F. Gerlinger.)

ing a small lumber carrier with the load-lifting device mounted across the front end of the truck, are you?      A. Yes.

Q. That truck of the defendant Willamette-Hyster Company has means to move the clutch to neutral position whenever the load-lifting device travels a predetermined extent in either direction, is that your understanding?

A. I didn't examine the truck.

Q. But is it your understanding that that lift truck of the defendant Willamette-Hyster has automatic means for moving the clutch to neutral position when the load lifting means reaches a predetermined upper or lower point?

A. No, I couldn't even tell you that.

Q. Is it your understanding that that truck of the Willamette- [419] Hyster Company with the load lifting device across one end of the machine has an automatic brake applied when the clutch is placed into neutral?

A. I don't know. Are you waiting on me?

Q. (By Mr. Fryer) The small truck of the defendant Willamette-Hyster with the load lifting device across the front end which you stated you understand the defendant Willamette-Hyster has been marketing is the one shown on the circular which I have just handed to you; is that right?

A. That is right.

Q. You have seen that truck around in different places, have you?      A. I saw one.



(Testimony of Carl F. Gerlinger.)

Q. I call your attention to the inner page of that circular where, under the heading "Exclusive Hyster Features," the circular states, "Automatic stops for all operating controls. Hyster lift truck is foolproof." Is it your understanding that this truck of the Willamette-Hyster Company contains automatic limit stops which push the clutch into neutral whenever the load lifting device reaches its upper or **lower limits?**

A. I don't see where it explains in this folder where it is.

The Master: That is not the question. The question is whether or not that particular structure does include it, whether you understand it includes it.

A. I don't understand that include it.

Mr. Fryer: I now ask to have marked for identification the circular referred to by the witness in his last answer, as Defendants' Exhibit 41 for identification.

The Master: It will be so marked.

(The circular was thereupon marked for identification Respondents' Exhibit 41.)

Q. (By Mr. Fryer) Do you recognize the truck shown on the photo- [420] graph which is now shown to you as a representation of the Willamette-Hyster truck which you have referred to in your testimony having a lifting device across the front end?

(Testimony of Carl F. Gerlinger.)

A. Yes, I recognize it, but not this particular design.

Mr. Fryer: I now ask to have marked for identification as Defendants' Exhibit 42 the photograph last shown to the witness and I will hand your Honor a copy of that photograph.

The Master: It will be marked 42 for identification, Respondents'.

(The photograph was thereupon marked for identification Respondents' Exhibit 42.)

The Witness: I saw that one.

Mr. Fryer: Yes. Just a minute. I am waiting for Mr. Geisler.

Mr. Geisler: What date do you claim for that, Mr. Fryer?

Mr. Fryer: We prefer not to give that to you at this time, Mr. Geisler.

Q. I now show you another photograph and ask you to state whether you recognize that as the same truck of the defendant Willamette-Hyster Company but with one wheel removed, showing the operating mechanism more clearly. And I hand your Honor a copy of the photograph last handed to the witness for your Honor's use.      A. Yes.

Mr. Fryer: I ask to have marked for identification the photograph last referred to by the witness as Defendants' Exhibit 43.

The Master: It will be so marked.

(The photograph was thereupon marked for identification Respondents' Exhibit 43.)

(Testimony of Carl F. Gerlinger.)

Q. (By Mr. Fryer) Now if the witness may be shown Exhibits 42 and 43 for identification, if the Court please, as soon as the Court is through with them. Looking at the photograph Defendants' Exhibit 43 for identification, do you recognize the yellow colored mechanism at the end of the truck opposite from the hoisting device as the defendant Willamette-Hyster's reversing friction clutch and brake, the brake being colored orange? [421]

The Master: Is that at the forward end of the hoist or the after end?

Mr. Fryer: The end of the truck at the opposite end; that is at the left hand side of the photograph.

The Master: Yes.

A. I see the color all right, but I don't see the brake very plainly.

Q. (By Mr. Fryer) Perhaps I may help you by pointing specifically to the part which I refer to and will ask you to state whether you recognize the yellow colored mechanism. A. Yes.

Q. At the end of the truck opposite from the hoist as defendant Willamette-Hyster's reversing hoisting clutch? A. Yes.

Q. And the orange colored mechanism at that same point—— A. The brake.

Q. As the automatic brake?

A. That is right, yes.

Q. Now will you state whether you recognize the red colored mechanism at the hoist end of the

(Testimony of Carl F. Gerlinger.)

truck on the photograph Defendants' Exhibit 43 for identification as automatic means to operate that yellow colored reversing clutch.

A. It is not clear to me.

Q. Assuming that the red colored mechanism at the hoist end of the truck on Defendants' Exhibit 43 for identification operates to push the yellow colored clutch into neutral whenever the load lifting means reaches an upper or lower limit of travel——

A. Yes.

Q. ——would you say that this truck mechanism on Exhibit 43 for identification contains the invention of your patent? [422]

A. I would answer this question: If it goes on a lumber carrier, I say yes.

Q. To further assist you in your answer, then will you refer to the photograph, Defendants' Exhibit 42 for identification, where that same truck is shown carrying a load of lumber, and ask you to state whether or not when so used the mechanism in that truck would contain the invention of your patent in suit?

Mr. Geisler: I would like a moment to examine those exhibits, because they raise a question.

(Consultation outside of the record between Mr. Fryer, Mr. Geisler and Mr. Dimick.)

Mr. Dimick: If the Court please, I am informed by counsel that these two photographs colored there are the same as the circular which was submitted;



I don't know the number of it; it has that red band, your Honor.

The Master: It is 41 for identification.

Mr. Geisler: 41, yes. Now it appears from those drawings that they are not lumber trucks in the sense that the invention had anything to do with it. For that reason we concede now they are not an infringement.

Mr. Fryer: The matter which I would like to know from the plaintiff, so that the rights of the defendant will be protected is whether or not the mechanism contained in Exhibits 42 and 43 for identification as explained to plaintiff is admitted by plaintiff not to come within claim 4 in the suit in so far as the mechanism for raising and lowering the load lifting means is concerned, the mechanism for automatically moving the clutch to neutral position upon the load lifting device reaching a predetermined upper and lower limit, the mechanism for automatically applying the brake when the clutch is pressed into neutral, and the manual means for operating that clutch. Now, if the plaintiff's position is that that combination of parts in this truck does not infringe claim [423] 4, then it will enable me to forego the proposed examination. If not, it will not serve any purpose.

Mr. Geisler: We are dealing here, your Honor, with an improvement of a lumber carrier in the specific sense of picking up the lumber and raising

and lowering it and moving it along. Now that is a different thing from a carrier of the type of a truck, purely and simply a truck. I think a mere inspection of the two devices differentiates them. I don't think that we should be compelled to make any further statement about it, and counsel said he offered these exhibits on the question of whether or not they infringed. Our answer is an admission they do not infringe.

Mr. Fryer: Is your statement then that there is no mechanism whatsoever in the truck shown on Defendants' Exhibits 42 and 43 which infringes claim 4 in suit in any respect whatsoever? Is that your position?

Mr. Geisler: It does not involve the combination which is included in claim 4.

Mr. Fryer: Well, is it a fact, then, that that truck shown on Exhibits 42 and 43 does not infringe claim 4 of the patent in suit in any respect whatever?

Mr. Geisler: If it does not infringe it in one respect it doesn't in any respect. That is all there is to it.

Mr. Fryer: Very well. Then we are satisfied. May I have the last question read, please, your Honor?

Mr. Geisler: Now I don't know whether there is any tail to that question. You don't mean to ask me whether the specific elements of those things are not shown in that invention—in that truck, of

(Testimony of Carl F. Gerlinger.)

claim 4? You are taking claim 4 in its entirety as a combination? That is the question to which you directed yourself?

Mr. Fryer: I refer to claim 4 that you are suing on.

Mr. Geisler: The combination involved?

Mr. Fryer: Yes, because the claim can only be a combination; nothing else. [424]

Mr. Geisler: Well, that is my position.

Mr. Fryer: Very well. Your Honor, in view of the specific admissions of plaintiff we withdraw that question and discontinue further examination on that line.

Q. At various times in your previous testimony you have said that the parts 76 and 74 of the drawings of your patent in suit did part of the work of pushing the clutch into neutral in your patent and at other times in your testimony you have said that no one of those two parts did any part of the work of pushing the clutch into neutral in the operation of the mechanism of your patent, and that matter was left with you during an adjournment for you to make a further study of your patent in suit. During one of the adjournments have you made a further study of your patent drawings? [425]

A. I made some study.

Q. How long a study did you devote to your patent?

(Testimony of Carl F. Gerlinger.)

A. Oh, about maybe fifteen or twenty minutes. I couldn't simply——

Q. As I recall your testimony, at the time of the adjournment, when you were to make further study of your patent, you said it would take about an hour for you to be able to study it sufficiently to answer these questions definitely. Did you find it unnecessary to devote that time to the study of your patent?

A. No. If you want to know the facts about that, I got sick; a spell came on me and I couldn't further study, give it any more study; but I study it about fifteen minutes.

Q. Did you have any assistance in making that study? A. No.

Q. In view of your illness?

A. No, none whatever.

Q. Did you consult Mr. Geisler in any way about that further study of your patent? A. No.

Q. And Mr. Geisler said nothing to you whatsoever about that portion of your patent during the adjournment? A. No.

Q. And you asked him nothing about it?

A. No.

Q. I just suppose that during that adjournment you didn't consult anyone else whatsoever concerning the operation of those parts of your patent during any adjournment; is that true?

A. I maybe did, but I don't remember.

Q. You don't remember who, if anyone, you talked to concerning that operation of your patent?

A. No.



(Testimony of Carl F. Gerlinger.)

Q. During the adjournment? A. No.

Q. Have you made up your mind now as to just how the parts 76 and [426] 74 in the drawings of your patent work in so far as the performance of any work in pushing the clutch to neutral is concerned?

A. 74—can I have the patent, please?

Mr. Fryer: May Exhibit No. 2 be handed to the witness, please.

A. 74 and 75 and 76 and 77, that have only for the brake operation.

The Master: For some reason or other I can't locate 75 for the time being.

Mr. Fryer: Looking at Figure 4, if your Honor please, 75 will appear as a little triangular-shaped cam on the upper surface of that horizontal bar.

The Master: Oh, yes. I get it. Now what was the answer?

A. 74, 75 and 76 and 77 exclusively is for the brake, I mean is for the brake.

Mr. Fryer: That is all.

## H. N. DIMICK

resumed the stand for cross examination and, having been previously sworn, was examined and further testified as follows:

## Cross Examination

By Mr. Fryer:

Mr. Fryer: May I see Plaintiff's Exhibit 11, if your Honor please? It is the drawing, yellow drawing. Will you show this to the witness, please, Mr. Bailiff.

Q. You are familiar, I assume, with the drawing shown on the Plaintiff's Exhibit 11 before you?

A. Yes, I have seen this drawing before.

Q. You understand that it represents a drawing of the machine of the Gerlinger patent here in suit?

A. I do.

Q. I call your attention to the part immediately overlying the top of the frame of the machine extending from the front end of the machine back toward the vicinity of the steering post and ask you to state what that member is. And I shall point it out [427] to you to show you what I mean.

A. I know what that member is; yes, sir.

Q. Will you state what it is, please.

A. Well, it is a connection between the steering post and the front fork or link in the steering gear.

Mr. Geisler: Pardon me, has that a number?

Mr. Fryer: There is no number on that drawing.

The Witness: There is no number here.

Q. It has rack teeth at each end for engagement with a pinion gear at the steering wheel end and

(Testimony of H. N. Dimick.)

with a segment gear at the front end of the machine; is that right?

A. I see the rack teeth and what is apparently here on the drawing a segment at the front end, but I don't see any rack teeth or pinion gear represented in this particular drawing at the rear end of the bar at the center of the machine.

Q. Is it your understanding that that member of the steering mechanism is supposed to have teeth at each end?

A. Well, speaking from memory only, I would say that that was the construction of this machine.

Q. The teeth on that bar at its end adjoining the steering post of the steering wheel would have to be long enough in their extent along the bar to provide the necessary length of forward and backward movement of that bar to properly operate the steering knuckle of the front wheel; is that right?

A. They would have to be, yes, in order to function properly.

Q. In the view which you have in your hands the end of that bar toward or adjacent the foot of the post of the steering wheel extends toward the rear of the machine a short distance beyond the ratchet for the brake pedal shown at that point; is that right?

A. Yes, I would take that to be the bar.

Q. In other words, the end of the bar extends toward the rear of the machine to a point about

(Testimony of H. N. Dimick.)

midway the center line of the steer- [428] ing post of the steering wheel and the rear edge of the steering wheel; is that right?

A. Well, I am stating this only presumably, because this bar shows a direct brake right at this point, and on this particular drawing there are no dotted lines or anything to show that as being a continuation of the bar, but in view of a part of your question and wanting to give the best answer possible, I would say that I would presume that that was intended to be an extension of that bar.

Q. From your experience as a mechanic and assuming that that bar has rack teeth on it to engage with a pinion at the base of the steering post, would you say that that bar would have to be about as long as is shown in this drawing in order to have sufficient teeth on it to turn the front wheels sufficiently to steer the vehicle?

A. I would say that, yes.

Q. So that you would say it is a reasonable assumption to assume that the end of that bar as it appears in Exhibit 11 is the mechanism which we see toward the rear of the machine behind the brake ratchet and extending to a point about midway between the center line of the post of the steering wheel and the rear edge of the steering wheel; is that right?

A. I would say that is a reasonable presumption.

Q. Now can you point out that bar which you have been describing on Plaintiff's Exhibit 11 and



(Testimony of H. N. Dimick.)

Defendants' Exhibit 25 for identification, in Figure 2 appearing thereon?

A. I would say that that bar is according to what is designated by the figure 21 on this Exhibit 25, I believe the figure is.

Q. And the teeth 22 on that bar 21 are the teeth which engage with the gear segment 23 in Figure 2; is that your understanding?

A. That is my understanding.

Q. And the teeth at the steering wheel end of bar 21 are designated by the reference character 20? [429]

A. Well, it has that appearance on the drawing. I imagine the indicator does point to the teeth on the rack bar.

Q. Now looking at Figure 1 of the Gerlinger drawing on Defendants' Exhibit 25 for identification, do you also see that bar 21?

A. I do.

Q. Do you also see in that bar a rectangular extension in parallelism with the bar 21 extending to the rear of the brake ratchet such as we saw on the drawing Exhibit 11?

A. I see an extending member there. I wouldn't say it is in parallelism. It is an extending member and it seems to be in alignment with the bar 21.

Q. You are referring now to the rectangular structure which I shall indicate on Defendants' Exhibit 25 by the reference character X?

(Testimony of H. N. Dimick.)

A. Yes, I am referring to that.

Q. (By Mr. Fryer) Now, is it your testimony that the portion marked X on Defendants' Exhibit 25 is not a continuation of the bar 21?

A. I say, apparently, according to the drawing, in my judgment, that would be a continuation of the bar 21.

Q. On Plaintiff's Exhibit 26 I notice certain colors applied to the parts, including red as one of the colors, and that on that exhibit the part which you have identified as X on Defendants' Exhibit 25 and have stated is a continuation of the bar 21 is colored red, while the rest of the bar 21 is not colored red. Does that have any significance in this exhibit, as far as you know, as to whether or not the red member marked X on Exhibit 25 is a part of the bar 21?

A. Well, due to the extraordinary atrocities of patent drawings in general, and in view of the fact that I mentioned when looking at this other drawing and seeing that there was no dotted line there to connect those two, and not having, as I remember, absolutely committed myself that that was an extension of the [430] bar 21, I might say that there could be a possible error due to the fact that there are no connecting dotted lines, or anything of that sort, to connect the two, but I do say now that that member in this particular drawing is colored red, the same as the smaller member extending rearward on the carrier.

(Testimony of H. N. Dimick.)

Q. What is your testimony now with respect to Defendants' Exhibit 25 for identification as to the part marked X? Is it your testimony that that part marked X is the rearward extension of the bar 21, or that it is not the rearward extension of the bar 21, in the machine of the Gerlinger patent?

A. Well, in my judgment, and due to the possible errors in the drawing, I would say that according to these views as they are here, particularly this one view which seems to be a view showing pretty generally the members through from the side elevation of the machine, according to this drawing as it appears here that could be a part of either of those members.

Q. And when you refer to "this drawing here" do you mean the chart, number 25?

A. Number 25. Just taking the drawing, and forgetting the colors, and so on, and reading it as a drawing by the white lines, I would say that in this view here that particular bar here, according to this view here, could be either a part of this member here or a part of that member (indicating).

The Master: When you say could be this or that, that doesn't mean anything in the record.

A. Well, this bar here is designated by two parallel lines here, black lines.

Mr. Fryer: I will clear that up in a minute. Now, if you will just take your seat, Mr. Dimick, and listen to this question and see if you can answer

(Testimony of H. N. Dimick.)

it correctly. Referring to the Gerlinger drawings shown on Defendants' Exhibit 25 for identification, will you state whether the part marked X on that drawing, in your opinion and according to your understanding of [431] the Gerlinger patent, is a part of the bar 21 or is not a part of the bar 21?

A. Well, I would consider it, taking all the views into consideration and taking the drawing as it is primarily executed, as a part of the bar 21.

Q. In some of the drawings which you have referred to in your previous testimony, presented by the plaintiff, some of the parts have been shown in different colors. Do you know what those various colors on those charts are intended to represent?

A. Well, if I were to refer to the drawings that are colored I could then, I think, say what the colors are to represent, but——

Q. Did you have anything to do with the placing of those colors on those parts of the plaintiff?

A. Well, I might say personally none whatever. I have an assistant in the drafting room, a young chap, whom I loaned to Mr. Waters and he went in another room adjoining the drafting room and did the coloring, but not under my supervision.

Q. Is it your understanding that there is any scheme or purpose in those colors by which the difference in colors shall signify certain things on the charts?

A. Well, my understanding of the colors—when they were applied to the drawings I didn't pay any



(Testimony of H. N. Dimick.)

particular attention—but my understanding was this that they were to assist anyone who might be reading the drawings in following the general outlay of the mechanism as shown on the drawings.

Q. Were parts colored the same intended to represent integral parts, or were different parts given the same color indiscriminately on the charts?

A. Well, I wouldn't say they were indiscriminately given the same color, different parts, but, as I stated before, my understanding is that they were to represent the various links in the mechanism, I might say.

Q. You would not say, for instance, that on the plaintiff's [432] chart, Exhibit 26, that all the parts which are colored red are part of one and the same piece in the machine, would you?

A. I would say that the putting the red coloring on there, it was intended that it should represent, well, not exactly the same parts, but one part pertaining to another. A better illustration is over there. I could explain it there, that the red——

A. I am referring to No. 2.

Q. (By Mr. Fryer): Are you referring to Exhibit 27?

A. Yes, Exhibit 27. Now, my understanding of those colors was this, that they were placed on there, the color or red, in some conversation I heard at the office in Dallas, was that meant to designate parts operated by hand on the mechanism.

(Testimony of H. N. Dimick.)

Q. Any hand-operated parts on the machine were to be colored red, was that it?

A. Yes, I believe that was the conversation I overheard.

Q. Well, then, the red on Exhibit 26 applied to the rear extension of the bar 21 was not intended to indicate that that red extension was part of the lever 70, for instance, was it?

A. By whoever put the colors on there that may have been deciphered as a part of the connecting links of lever 70—it might have been read as a part, I should say.

Q. According to your present understanding, the rear extension of the bar 21, which is colored red on the chart, Exhibit 25, however—26, I should say—is merely the rear extension of the bar 21 and is no part of the clutch-operating mechanism; is that your understanding?

A. Well, my understanding there is—if I could clear this thing up——

Q. Go right ahead.

A. —that there has been an error in the coloring of that drawing.

Q. And what was that error? [433]

A. In my judgment I would say that whoever colored the drawing should not have colored the rear end of this particular part right here in red (indicating).

Q. When you say “this particular part right here” you refer to the rear end of the bar 21?

(Testimony of H. N. Dimick.)

A. This extension (indicating). Yes.

Q. In your previous testimony, referring to the machine of the Gerlinger patent, you stated that when the automatic brake is applied the bar 76 applies the brake to a pulley wheel on the end of the shaft 46. Will you refer to Plaintiff's Exhibit 2 and point out that pulley wheel which you there refer to, and I will ask that the witness be handed the patent, Plaintiff's Exhibit 2.

A. May I ask if in my statement regarding the applying the brake if the pulley wheel was the only member that I mentioned? You have a copy of it there.

Q. Just a moment; I will quote your testimony to you. You were asked what would happen—pardon me—you were asked, “What would be the effect of such movement? What would it do?”, referring to parts I have mentioned of the Gerlinger patent, and you said, “Well, I am just getting to that. I am just trying to find the proper numbers—where they are located on these drawings. There is a brake arm 76 which on its under side is also supplied with a cam. Now, I don't find a cam shown on this patent drawing, but regardless of whether there is a cam there or not if this lever 75 was in a position where it didn't engage the bottom of lever 76, or it was disengaged with the higher points of the cam on that lever, the action when this lever 70 and 48, and connecting with the bar 74 carrying the cam 75, would move in that direction, these cams

(Testimony of H. N. Dimick.)

would contact at their higher point and raise the bar 76 and apply a brake to the shaft—a continuation of the shaft 46, which extends clear through to the outside—would apply a brake to a pulley wheel on the end, or [434] a brake mechanism on the end of the shaft 46, on its outer end.” Now, my question is, where is that pulley wheel which you there refer to in the Gerlinger patent?

A. Well, you are referring to Figure 4. That being the only view, I do not actually find the pulley wheel there, but in describing the patent yesterday as best I could I mentioned both that the brake would be applied to the shaft or to a pulley wheel, and in going through the different drawings, and not being accustomed to testimony of this kind, and, furthermore, not having previous to, say, perhaps two minutes to the time I was called on the witness stand reviewed this patent, and perhaps not looking at this particular patent drawing in detail for a period of three to four months before the trial came, there is a possibility I may be in error, and in reading this particular drawing, but I think that I mentioned in my testimony—I had it in mind at all times since this question was put to me today—that I mentioned that applying a brake to the shaft or a pulley wheel, and at that time I was trying to get my evidence in sequence, and I did not examine the drawings to see whether or not there actually was a pulley wheel on the end of that



(Testimony of H. N. Dimick.)

shaft, but in the real Gerlinger lift, the one that I was acquainted with on the actual machine, there had always been a pulley wheel there, so I took it for granted it should be in the drawings. At least, it should be.

Q. That is, in your explanation of the patent in suit here you rely to some extent upon your familiarity with, and knowledge of, a commercial machine built by the Dallas Machine & Locomotive Works, is that right?

A. Yes, in my description I was bearing in mind at all times the actual mechanism to assist me in following this drawing more readily.

Q. And in that actual mechanism there was contained a pulley wheel, is that right?

A. In all cases I remember, yes. [435]

Q. And your testimony now is that that pulley wheel is not shown in the drawings of the Gerlinger patent?

A. I don't find it in this drawing today. I am not able to find the pulley wheel.

Q. Throughout your description and explanation of the machine of the Gerlinger patent as shown in drawings and description of Exhibit 2 you relied upon the recollection of Gerlinger carriers as you found them operating in the field, did you?

A. I relied on my remembering of the mechanism to sort of guide me through the various drawings, of which there were three up here, with the

(Testimony of H. N. Dimick.)

numbers promiscuously over the three drawings, to just aid me in following the mechanism.

Q. I believe you have stated that in the latter part or the early part of the year 1922 you saw a lumber carrier which was built substantially as shown by the patent, Plaintiff's Exhibit 2. Did that machine there referred to by you contain parts substantially identical in construction and operation with the parts 90 and 91 on Plaintiff's Exhibit 6 before you?

The Master: He is referring to Exhibit 6, Mr. Dimick. That is the chart on the board.

Mr. Fryer: That is the chart.

A. You mentioned Exhibit 2, also, in your question.

Q. Yes, sir.

A. Yes, I saw a carrier that was built substantially as this Exhibit 2, and that carrier built substantially, as I said as Exhibit 2, did not when I first observed it have the parts 90 and 91, in my memory, and I might add that looking at the parts 90 and 91 do not recall to my memory anything that I saw in this particular number 1 machine, the number 1 plaintiff's machine. I do not recall to memory any parts of that kind in the plaintiff's number 1 machine.

Q. That plaintiff's number 1 machine had only a part like the part 67 on Exhibit 6, which when pushed upwardly by the load in the machine pushed the clutch to neutral, is that your recol- [436] lection of it?

(Testimony of H. N. Dimick.)

A. My recollection is that that particular number 1 machine, what has been referred to as the number 1 machine here in the Court, had only the upper stop 67—that is, as an upper stop.

Q. Now, you stated, I believe, that just before you left for Australia, and after seeing the last Gerlinger hydraulic carrier which you saw manufactured by the plaintiff, you saw in construction at the plaintiff's plant a Gerlinger RPF carrier of the rack and pinion type. Will you state whether or not that RPF Gerlinger carrier which you saw in construction at the plaintiff's plant just before you left for Australia contained parts substantially identical in construction and operation with the parts 90 and 91 of Exhibit 6?

A. That question reads that the machine that I saw——

Q. I will withdraw the question and put it this way——

A. Well, I—okeh.

Q. —I believe in your previous testimony you referred to a Gerlinger RPF carrier which you saw in course of construction at the plaintiff's plant shortly before you left for Australia. Will you state whether or not that RPF carrier which you saw at that time contained a member like the bar 67 shown on Exhibit 6 which operated upon upward movement of the load to push the clutch into neutral position?

A. At the time I left for Australia the RPF carrier which was under construction at the Dallas

(Testimony of H. N. Dimick.)

Machine & Locomotive Works had not progressed far enough to require parts of that kind.

Q. That was a rack and pinion type carrier, that RPF carrier you refer to?

A. The plans were to make an RPF carrier, rack and pinion type carrier, but the racks had not been supplied yet when I left for Australia.

Q. After that occasion when you were about to leave for Australia did you ever see any so-called RPF carriers made by the plaintiff? [437]

The Master: The witness now answers "Yes".

Q. (By Mr. Fryer): Did any of those RPF Gerlinger carriers which you saw contain a part like the part 67 of Plaintiff's Exhibit 2—

A. They did not—oh, I beg your pardon.

Q. —which pushed the clutch into neutral when engaged by the load in the machine?

A. They did not.

Q. In your description of plaintiff's patent in suit, Exhibit 2, you have stated, I believe, that you failed to find in the patent numbers to indicate a stop described in the patent as means for disengaging the clutch or throwing the clutch in neutral position and applying the brake when the load-lifting means had traveled a predetermined extent in either direction. Did you also fail to find in the drawings of the patent, Plaintiff's Exhibit 2, any parts to which such numbers properly could have been applied to indicate the kind of stop mechanism you there had in mind?



(Testimony of H. N. Dimick.)

A. Well, it seems to me that the question, Attorney, has placed a sort of a double question, or a statement and a question.

Q. Do you fail to understand the question, Mr. Dimick?

A. Well, it doesn't—your inference doesn't—I don't quite get it. You say that you——

Q. I will try to make it plainer for you by quoting your previous testimony, and that, perhaps, may help you.

Mr. Geisler: What page is that, please?

Mr. Fryer: Page 256. You testified as follows, referring to the patent in suit and Plaintiff's Exhibit 6, you said, "Then when I had completed the reading of the patent as far as reference numbers were concerned, and included in the patent description, I failed to find numbers to indicate a stop described in the patent as a means of stopping the lifting mechanism when the—or, in other words, it should be disengaging the clutch [438] or throwing the clutch in neutral position and applying the brake when the load-lifting means had traveled a predetermined extent in either direction." Now, with that testimony of yours in mind, will you state whether or not you likewise failed to find in the drawings of the Gerlinger patent any parts to which the numbers properly could be applied to indicate the kind of stop you there had in mind?

Mr. Geisler: May I ask, your Honor—I beg your pardon, but I think the counsel should read the full

(Testimony of H. N. Dimick.)

question and not leave out those reference numbers and not try to perplex the witness. I submit the question is not fair that way. The question is to be interpreted by reading what has been previously testified by the witness. The whole question should be put.

Mr. Fryer: I am quite willing to read as much of the record to the witness as he would like to hear, your Honor.

The Master: Are you reading a part of a question?

Mr. Fryer: Well, part of a long answer, about a page and a half, or one page, long. I would be glad to read it all, if your Honor thinks it advisable.

The Master: Well, of course, I don't know what the answer was. If counsel for the plaintiff feels that there is part of that answer or of your question that should be read to the witness so that he will understand——

Mr. Fryer: I would be glad to have counsel read any part of the record to the witness he wants.

Mr. Geisler: Well, the question as put embodies the re-reading—or at least the reading of the answer of the witness as put yesterday. I suppose there are a couple of lines. Here is what it says: “\* \* \* Or, in other words, it should be disengaging the clutch or throwing the clutch in neutral position and applying the brake when the load-lifting means had traveled a predetermined extent in either

(Testimony of H. N. Dimick.)

direction, and my interpretation of this action was that the members 90 and 91 were members supplied to terminate the movement of the load-lifting means to [439] a predetermined extent in the upward direction." Now, by reading that much I think the witness's mind is directed explicitly to what he said yesterday.

A. Your Honor, may I place a question here to get myself straightened out?

The Master: Yes.

A. Just there in that particular wording was I testifying at that time on this Exhibit 2, or was it Exhibit 6?

Mr. Fryer: I will read you the question to which you made the statements which your counsel has quoted to you, and that may clear your mind on the matter. Plaintiff's counsel asked you, "Mr. Dimick, you may state why on that drawing, Complainant's Exhibit 6, you included the devices 90 and 91 in addition to 67?" and the statements which you have had quoted to you were in answer to that question.

A. I see. Well, that is correct. I did make those statements and explained why I added those, but I thought you were asking the question—sorry—I thought you were asking the question as regards my testimony on Exhibit 2.

Q. Now, to make it simpler for you, Mr. Dimick, I will merely put it this way: In your answer to the question I just read to you, among other

(Testimony of H. N. Dimick.)

things you said, "Then when I had completed the reading of the patent as far as reference numbers were concerned, and included in the patent description, I failed to find numbers to indicate a stop described in that patent." A. That is correct.

Q. Now, my question is, did you also fail to find parts to which any such numbers could have been applied?

A. In the reading of the patent, you mean?

Q. Yes.

A. I didn't find any parts mentioned in the patent, specific parts, that would indicate levers 90 and the part 91.

Q. May the witness be shown Plaintiff's Exhibit 37, please? Do I correctly understand that your free-hand sketch, Plaintiff's [440] Exhibit 37, was intended as an expression of your understanding of how the parts 67, 69 and 48 of the patent in suit could be constructed, or that such sketch illustrates what you understand the drawings to represent?

A. My purpose in making this sketch up—I think I more or less misunderstood—my idea in making this sketch was not with the idea of bringing this sketch into court at all, but Mr. Geisler informed me that His Honor did not understand exactly how that operation could be carried out, and I made this sketch hurriedly while I was having lunch and brought it back here with the intention of showing the Court how a cam, a certain



(Testimony of H. N. Dimick.)

type of cam, could be placed to move the lever 48.

Q. Is it your understanding that the disclosure of the Gerlinger patent in suit relating to the parts shown on your sketch Exhibit 37 is somewhat indistinct or uncertain?

A. You are referring to the patent drawings?

Q. Yes.

A. Well, they are as they are shown on the patent drawings in the three exhibits. In the places they appear in the three exhibits, why, they are rather difficult to decipher in their particular operation, I would say.

Q. Inasfar as those mere drawings alone are concerned, unaided by your recollection of how the actual Gerlinger machines which you saw in the field operated; they do not give you a very clear idea of some of the details of construction of the machine of the Gerlinger patent, is that true?

A. That is true.

Q. For instance, referring to the chart Plaintiff's Exhibit 27, do you have a clear conception of what is represented by the two parallel lines extending in an inverted U shape about the end of the lead line leading from the reference character 69?

A. The lead line 69 is according to the patent description. I believe that was mentioned as a bar with a cam-shaped upper end. [441]

Q. I would like you to state whether you yourself have any clear conception of what part of the

(Testimony of H. N. Dimick.)

mechanism is represented by that U-shaped structure indicated by the two parallel lines forming an inverted U at about the end of the lead line coming down from the figure 69?

A. That I would say, those parallel lines represent the cam mentioned.

Q. That would all be part of the cam 69, in your opinion, is that right?

A. It would in my opinion, yes, the way it is shown there.

Q. And that would be a cam something like the one shown on your sketch Plaintiff's Exhibit 37?

A. Well, it may not be the same in exact detail. For instance, there might be a flat spot, or something like that, shown there. There are two lines shown there running parallel to each other.

Q. Now, have you in your own mind any clear conception of how the part 67 is hung in the drawings of the patent Exhibit 2 inasfar as its pivotal mounting is concerned?      A. Yes.

Q. How was that mounting arranged?

A. Well, there was—you say so far as the drawing is concerned?

Q. The drawing of the patent Exhibit 2.

A. Well, the drawing of the patent Exhibit 2—you refer to this drawing, is that right?

Q. Any of the drawings of the patent in suit, Exhibit 2.

A. Well, on this 27, Exhibit 27 here, there are no means of hanging that bar shown in this particular drawing that I can find.

(Testimony of H. N. Dimick.)

Q. Well, can you find any such means anywhere in the patent Exhibit 2 which gives you any idea on that subject?

A. No, I see nothing there that would indicate a hanger.

Q. Referring to the chart Plaintiff's Exhibit 27, will you state in what direction the hand lever 70 moves when the operator [442] employs it for putting the clutch in or out of operative position?

A. In what direction? In or out of operative position?

Q. Yes.

A. In going in or out of operative position it could move in either of two directions.

Q. Well, is it your understanding that the operator when he grasps the hand lever 70 to actuate the clutch rotates that lever toward the upper part of Exhibit 27, or, in another case, toward the lower part of Exhibit 27?

A. That is correct.

Q. Is it your understanding that the pivot shown for the hand lever 70 in the drawings of the Gerlinger patent is correctly placed to permit that operation?

A. I believe that any mechanic would consider that that was the case, that that pivot was properly placed.

Q. That pivot is placed for rotation of the handle 70 about an axis extending at right angles to the longitudinal axis of the machine, is that your understanding?

(Testimony of H. N. Dimick.)

A. Well, this drawing is a plan view, as I understood it, and if the lever did not go directly straight down or toward the wheel as shown there for your information, and there was an offset in it, that would show as it is shown there on the drawing. If there was any offset in that lever it would show in—well, in parallel lines running across the drawing.

Q. As far as you can see, then, the drawings of the Gerlinger patent Exhibit 2 with respect to the arrangement of the hand lever 70 are entirely clear and not one of these atrocities you referred to in your previous testimony, is that right?

A. Well, it might be an atrocity in the drawing, but I am just explaining how I would decipher it, that that never has—it has an offset in there to bring it back nearer the speed or convenient to the operator; it has an offset; it is offset toward the rear of the machine, between the coupling with the link that couples the bottom of that lever to the lever or bar [443] 48, and in making the drawing the draftsman who made these patent drawings intended that to show that the lever did extend backward toward the feet to bring it close to the operator.

Q. What I am interested in knowing, Mr. Dimick, is whether inasfar as the handle 70 of the Gerlinger patent is concerned your understanding of the construction and operation of the machine is entirely clear. A. Yes.



(Testimony of H. N. Dimick.)

Q. You had no difficulty with that part of the drawings in understanding how it works, is that right?

A. That is correct.

Q. Do you have any recollection of the so-called first Gerlinger machine which is sufficiently clear to enable you to identify a photograph of a machine having substantially the same construction as that first Gerlinger machine?

A. I think I could identify a photograph if it was substantially the same.

Q. I show you three photographs of a lumber carrier and ask you to state whether or not the construction of that lumber carrier, insofar as you can understand it from the photographs, is substantially identical with that of the so-called first Gerlinger carrier which you have testified about? I hand Your Honor copies of the photographs just handed to the witness, that you may have for your own use if you care to.

The Master: Thank you.

A. I do not find anything there that is necessary for me to identify that as substantially—What was the word you used there? Read the question again.

(The question was thereupon read.)

A. I find parts there that are an exact duplicate of the first Gerlinger carrier as I remember it, and there are a great many parts of the machine which are not shown, so I would not be able to

(Testimony of H. N. Dimick.)

identify it as substantially identical of the first Gerlinger carrier. [444]

Mr. Fryer: May I have the photographs, please? We now ask to have marked for identification as Defendants' Exhibit 44-A the rear view of the three photographs referred to by the witness.

(The photograph referred to was thereupon marked for identification Respondents' Exhibit 44-A.)

Mr. Fryer: We ask to have marked as Defendants' Exhibit 44-B for identification the side elevation photograph referred to by the witness.

(The photograph referred to was thereupon marked for identification Respondents' Exhibit 44-B.)

Mr. Fryer: And we ask to have marked 44-C for identification the rear view of the machine with a load of lumber in it.

(The photograph referred to was thereupon marked for identification Respondents' Exhibit 44-C.)

The Master: 44-A is the rear view empty, is that right?

Mr. Fryer: Yes, Your Honor.

The Master: They are so marked.

Q. (By Mr. Fryer): Now will you look at the photograph 44-B for identification and point out thereon any of the parts which you say are sub-

(Testimony of H. N. Dimick.)

stantial duplicates of the first Gerlinger machine which you have referred to?

A. In answering these questions do you want me to point out the likenesses on the drawing?

Q. (By Mr. Fryer): Not for the time being. You have mentioned that on these photographs you found some parts which were duplicates of parts in the Gerlinger No. 1 machine. Now I am merely asking you to point out which parts on the photograph constitute those duplicates, and I handed you the photograph Exhibit 44-B for that purpose.

A. Well, I find on this particular drawing I can see two of the rack bars, the right hand front and right hand rear rack bars. I find a longitudinal shaft running practically equivalent of the wheel base of the machine. [445]

Q. May I ask, if you refer to them by the colors which appear upon the photograph then we will all be able to know which they are.

A. That shaft is yellow; I guess you would call it yellow; and the rack bars I refer to are——

Q. That is intended to be purple.

A. I was going to say I wasn't an authority on that color but I thought it was purple. And I find a housing about the center of that shaft that seems to resemble very much the worm housing, the worm wheel housing that was on the No. 1 machine.

Q. That is also colored yellow?

A. That is also colored yellow. Then I find—I see an upright lever there colored——

(Testimony of H. N. Dimick.)

Q. Brown.

A. Orange, I would say. Is that correct?

Q. No; it is supposed to be brown.

A. Brown. That resembles the upper end of the lever on No. 1 machine. I remember at one time that No. 1 machine had another little projection there but it is really not mechanically very important, as I remember now. And on this rear right hand rack bar, which is colored purple, I find an angular bracket.

Q. That is marked with black cross-hatching?

A. Yes; and while not in every detail substantially identical it represents the same thing, inasmuch as some of the same details might be gone into on a patent drawing. They don't show it very plainly, but I imagine that is the equivalent of a set screw on the down stop. And also in brown here I find a braking mechanism which is——

Q. That was intended to be orange, Mr. Dimick.

A. Sorry. O. K. Orange I will say, then.

Q. It is our fault.

A. It operates on the same principle as the brake on the No. 1 machine, as I remember it. And in green I find first a couple of bearings or boxes setting on the top or on the deck frame. It seems to me to be substantially similar to the No. 1 machine. [446] And I see the ends of some crossbars and gusset plates, and they are also continued down. I can't tell just how far they go here, but they are



(Testimony of H. N. Dimick.)

much of the same design. And speaking of—well, we will go on down here. There are some lower fork bearings or boxes that serve the same purpose, that resemble those in the No. 1 machine. But insofar as the green colors are concerned, I don't see that the side view—as far as frame structure is concerned it doesn't seem to recall the No. 1 machine in the exact detail, but the members that I have mentioned are somewhat similar. And not colored, and in front particularly, just behind the rack bar and pinion I see a worm housing there; that is, speaking of in front of the machine on the right hand corner, right hand front corner. There is a worm housing there that reminds me of a worm housing on the No. 1 machine, and the sprocket in the rear of the large sprocket directly above the wheel hides any structure that might be directly behind that; and the other driving sprocket, the one forward of the big sprocket mentioned, one at least that might be larger or smaller, but primarily a driving sprocket there, is much the same as the No. 1 machine. The motor is of the same design, as near as I can see, as the No. 1 machine, as I remember it. The radiator and all seem to have about the same contour. The seat—well, it is just a seat. I don't remember exactly.

Q. How about the part shown with black lines drawn across it just below the upper member of the frame in the corner where that brace appears?

(Testimony of H. N. Dimick.)

A. Yes. I meant to mention that. Yes, that brings to memory that bar underneath the frame is the load stop.

Q. That is a bar corresponding to the bar 67 of the Gerlinger patent? A. Yes, sir.

Q. Now will you look at the rear end view of that machine shown in the photograph Exhibit 44-A for identification and point out [447] if you will, on that photograph, what parts, if any, you find substantially the same as parts which you recall in the No. 1 Gerlinger machine.

A. Is it necessary to mention parts I have mentioned before?

Q. No.

A. Well, I will mention first the back of the rack bar. I can see the teeth very dimly here. The back of the rack bar on the left hand side painted purple, that looks very much the same. And then there is a shaft, a cross shaft, yellow, which seems to be identical with the shaft on the No. 1 machine; that is, as far as the purpose is concerned; it might be larger or smaller. Then I see the operating lever with the left hand offset. That is painted brown. It serves the same purpose. It might not be exactly the same shape; it doesn't really seem to be the same shape, as I remember the No. 1 machine. Then I see a fore and after member; I believe it is meant to be yellow, isn't it?

Q. Yes.

(Testimony of H. N. Dimick.)

A. That fore and after member that pivots where the green bracket is shown here?

Q. Yes.

A. It is shown just under the shaft.

Q. It is colored yellow as well as will show on the photograph.

A. Yes. O. K. Well, that would be the equivalent of the—oh, I have forgotten the number now. I believe it is shown by 64 here extending back.

Q. When you say “here”, you mean in the drawings in the Gerlinger patent?

A. 64 on this drawing here. It comes back here in a similar manner. I am just saying that I see a member there painted yellow, and I see also some connecting links there with various nuts and so forth that are painted yellow. Then there is—well, that pivots in a bracket or bearing or something of that sort that is painted or colored green here. [448]

Q. That is lying just below the yellow shaft?

A. Yes, just below that, and it is fastened to the—it is bolted, it looks here, on top of the base of the rear worm housing. Well, to say that is substantially the same as the No. 1 machine, that would be pretty difficult, but it serves the same purpose as the similar device on the No. 1 machine. The form may have been changed. And also apparently pivoted, or fastened by a bolt which has a form of a pivot, is an angular member known to the profession as—I suppose that represents a bell crank. It has the cross lines, the black cross lines

(Testimony of H. N. Dimick.)

to make it more distinct on the photograph, and it seems to me that—when I was first observing this machine at the Willamette Valley Mill in Dallas my recollection is that that bell crank is not substantially the same as the bell crank; that is, in its position on the carrier the way it is located. I have mentioned this right hand rear rack bar with the device with the cross line at the top. And here in this drawing I also see the final drive housing, which seems to be substantially the same, and the sprocket and driving head body construction on the left hand rear of the machine in view here; it seems to be substantially the same. And I also see a view of this bar 67 underneath marked by the cross lines. I won't go any farther on the cross bar for the moment. Well, as far as the parts of the frame members themselves colored green and these lower fork boxes and the upper fork bearings, they seem to be very much the same, but on the legs of the frame I see a couple of members apparently made out of flat strap iron there. I don't recall having seen any similar pieces on the No. 1 machine, though they may have been there; I don't remember. But to get down to the shoes painted purple, or colored purple, rather, I don't remember that No. 1 machine as having that type of lifting shoe.

Q. What type of lifting shoe did it have in comparison with the ones shown in the photograph, as you recall them? [449]



(Testimony of H. N. Dimick.)

A. Well, when I was operating this machine just spasmodically to familiarize myself with it, it seemed to me that in order to pick up a load I had to be rather careful of spotting the machine so that the lifting shoes would engage the bolster. In other words, there wasn't, as I remember it, there wasn't an extension, or the long angle iron in there for the lifting shoe. And is it necessary that I go into details of forks and the common numbers?

Q. No.

A. Well, those are the substantial things that I see that seem about the same as the No. 1 machine.

Q. As far as you can tell from these photographs before you, Defendants' Exhibits 44-A and -B for identification, does this machine on the photographs have any parts like the parts 90 and 91 on Exhibit 6?

A. No, I don't see any parts here that would—well, if they were here the part 91 would be obscured, I believe, in any case, and I don't see anything here—there is nothing shows that would remind me of—I believe the number was 90, the upper bar, was it not?

Mr. Fryer: That is all.

Mr. Geisler: I don't know of any redirect I want. If something should occur I ask permission to call the witness again.

Mr. Fryer: Oh, surely, I don't object to recalling him.

Mr. Geisler: Yes, so as not to waste any time.

(Witness excused.)

## WALTER E. BALLANTYNE

thereupon resumed the stand as a witness in behalf of the plaintiff and, having been previously sworn, was further examined and testified as follows:

## Cross Examination

By Mr. Fryer:

Q. You have stated, I believe, that you have the records concerning 95 RPF Gerlinger carriers made and sold by the plaintiff. What do these records consist of? [450]

A. The RPF, did you state?

Q. Yes, the RPF Gerlinger carrier.

A. It shows the delivery dates on all of the carriers.

Q. Anything else?

A. The model there, the date.

Q. It shows the dates of delivery? A. Yes.

Q. Have you those records with you?

A. I have them in the court room, yes, sir.

Q. Will you produce them, please?

(Witness produces records.)

Mr. Fryer: Now, if the Court please, may we see the records produced by the witness.

The Master: Has he produced them? Have you them there now?

Mr. Fryer: I believe so.

The Witness: Yes, I have them here. I am just hunting where they first start. (Witness indicates to Mr. Fryer.)

Mr. Fryer: That is all right. I will just look at them and if I have any questions I will ask you.

(Testimony of Walter E. Ballantyne.)

May I have your Honor's indulgence for just a minute. It may save time in examination.

The Master: Surely.

Q. (By Mr. Fryer): You have called attention to one page in this book which you have produced with entries commencing with the date of March 5th, 1929, and ending with November 21st, 1930. Are those the only entries on your records concerning the 95 RPF Gerlinger carriers, or are there others than these? A. There are others.

Q. Will you point them out to me, please.

A. They start in here (indicating). Now there are other models besides the RPF in here. All models are in here.

Q. In the record which you have produced there is a brown sheet, the first entry on which is dated March 5th, 1929. Is that the date of the sale of the first Gerlinger RPF carrier?

A. That is the date of delivery. [451]

Q. No Gerlinger RPF carriers were delivered prior to that date, according to your records; is that right?

A. There were none sold and delivered prior to that date, yes.

Mr. Geisler: A little louder, would you please.

Q. (By Mr. Fryer): Can you in this record mark, in numerical order, with the numbers 1, 2, 3, and so forth, the various pages in that record book which carry the dates of delivery of all of the RPF carriers sold and delivered by the plaintiff in this suit?

(Testimony of Walter E. Ballantyne.)

A. I don't know whether I know what you mean.

Mr. Fryer: Will you read the question, please?  
(Last question read.)

A. I think I can.

Q. Will you do it, please, just so that we will have the places identified in your record.

A. I am kind of mixed up here.

Q. You may take it to your seat, if you prefer, and check through it and then mark them.

(Witness marks in book as requested.)

Q. Can you state briefly how these entries have been made that appear in the record book that you have produced?

A. They have been made as the carrier was delivered. Originally I used to have a sheet in there for every carrier, with those brown indexes, but my book got too small, so some of them that were obsolete were taken out.

Q. On each one of these pages which you have marked consecutively from 1 to 9, inclusive, appear the records for the delivery of all RPF Gerlinger carriers sold by the plaintiff company?

A. There is one or more on each page, yes.

Mr. Fryer: We offer in evidence, if your Honor please, the pages of this record identified by the witness and bearing the numbers 1 to 9, consecutively and inclusively, and we agree that a photo-static copy of those pages may be substituted for the [452] original so as not to deprive the plaintiff of this original record.



(Testimony of Walter E. Ballantyne.)

Mr. Geisler: No objection.

Mr. Fryer: And we ask that those nine pages be marked Defendants' Exhibit 45.

The Master: They will be so marked and received.

(The nine sheets of record book showing delivery of RPF Gerlinger carriers sold by plaintiff were received in evidence and marked Respondents' Exhibit 45, sheets 1 to 9, inclusive, photostatic copies to be substituted.)

Q. (By Mr. Fryer): You have been present in court during all of the taking of the testimony in this case up to the time that you first took the stand?

A. I have, practically all the time. I believe I was out a couple of times.

Q. You heard Mr. Gerlinger's testimony given during that time? A. Yes, sir.

Q. You also heard Mr. Dimick's testimony?

A. Yes, sir.

Q. And you heard each of those witnesses explain that the so-called No. 1 Gerlinger machine did not have any parts in it substantially the same as the parts 90 and 91 on Plaintiff's Exhibit 6 for stopping upward movement of the load lifting means

A. Well, I don't remember all their testimony. I would not say yes or no on that.

(Testimony of Walter E. Ballantyne.)

Q. Well, is it also your recollection that the No. 1 Gerlinger machine did not have parts 90 and 91, as shown on Exhibit 6, as testified to by Mr. Dimick and Mr. Gerlinger?

A. As I remember it, it didn't.

Q. The only machines which you recall having the parts 90 and 91, as shown in Exhibit 6, were some of the machines subsequent to No. 1 machine; is that right?

A. Yes, sir; from the second machine on. [453]

Q. So that your testimony is that the Gerlinger No. 1 machine is the only one which you recall which had only a bar like the bar 67 of the patent in suit and no parts 90 and 91 which the Dallas Machine Company ever made; is that right?

A. That is right, I believe, to the best of my recollection. [454]

Q. (By Mr. Fryer): You were working for the plaintiff in 1923? A. I was.

Q. Generally, what did all of your duties consist of at that time for that company?

A. Well, I was in charge of the office. In fact, I was in the office by myself, handled the correspondence, done the buying. After hours even worked some out in the shop.

Q. You spent some of your time in the shop and some of your time in the office at that time?

A. It was strictly an office job.

Q. Did your work in the office bring you any knowledge of the products being manufactured and sold by the plaintiff? A. It did.

(Testimony of Walter E. Ballantyne.)

Q. How did you gain that knowledge? By inspection of the products?

A. By inspection of the products, and I kept all records on it, cost records; purchased the material, most of it, for them.

Q. Did that office work also give you some knowledge of the marketing of the products, from which you obtained this knowledge? A. It did.

Q. I suppose you followed the sales of the various lumber carriers which were made by the plaintiff at that time, did you?

A. To a great extent, naturally.

Q. And was it part of your duties to keep in touch with the carrier business in order to better perform your work in connection with the sales of carriers which were conducted through your office?

A. I was not in charge of sales, but naturally I took quite an interest in it.

Q. (By Mr. Fryer): In view of that interest which you took in the sales of carriers by the plaintiff did you acquire any knowledge of any competing machines which were being sold in competition with the plaintiff's carriers? [455]

A. By name only.

Q. And how did those competing machines come to your knowledge by name only at that time?

A. Well, I had seen their advertisements in magazines. Naturally we kept track of, if we lost a sale, who got it.

(Testimony of Walter E. Ballantyne.)

Q. Did you also, in instances of that kind, make any effort to find out the factors which caused the loss of the sale in any way?

A. Personally, no.

Q. Did anyone——

The Master: You will have to speak up, Mr. Ballantyne. I can't hear.

A. Personally, no.

Q. (By Mr. Fryer): Well, as an employe of the corporation did any such knowledge come to you from others working for the corporation?

A. Sometimes, yes.

Q. Now, after the year 1923 did your duties continue year by year for the plaintiff in substantially the same capacity and extent as you have just been describing?      A. They did.

Q. I believe you said in your previous testimony that you knew the defendant Clark & Wilson Lumber Company had purchased several carriers from the Willamette-Hyster Company and for that reason that someone on behalf of the corporation plaintiff went to see the defendant Clark & Wilson's Willamette-Hyster carrier. How did you acquire knowledge of Clark & Wilson's purchase of a Willamette carrier?

A. Just heard it talked over in the office.

Q. Talked over by whom?

A. Why I couldn't say now.

Q. Do you know how long after defendant Clark & Wilson acquired a Willamette-Hyster it was be-



(Testimony of Walter E. Ballantyne.)

fore this matter was talked over in the office of the plaintiff? [456]           A. No.

Q. Was it a long period of years, or a short space of time?

A. I don't even know when the Clark & Wilson bought it. I am unable to answer that.

Q. As far as you know, then, the defendant Clark & Wilson might have had this Willamette carrier for a long period of time before the plaintiff acquired any knowledge of it, is that right?

A. Before I did, anyway.

Q. Now, when your company inspected the defendant Clark & Wilson's lumber carrier did it have any difficulty getting access to the carrier for that inspection?

A. I wasn't there at the inspection, but not as far as I heard.

Q. You did not hear anything in the discussions at the plaintiff's plant or office concerning any unusual methods that had to be resorted to in order to inspect the defendant Clark & Wilson's lumber carrier, did you?           A. No.

Q. Now, at the time that someone on behalf of your company inspected Clark & Wilson's lumber carrier I suppose they also saw Clark & Wilson's Ross carriers around the plant at the same time, is that your understanding?

A. I had no understanding on that point.

Q. You know that defendant Clark & Wilson uses a large number of Ross carriers today, don't you?

(Testimony of Walter E. Ballantyne.)

Mr. Geisler: I object to that question. I think that is immaterial, what they do now.

Mr. Fryer: Well, I will modify the question and confine it to at the time of the bringing of the suit, then.

A. Well, at the time they reported back on that there was nothing that I remember was said of Ross carriers.

Q. When did you first learn that the defendant Clark & Wilson Lumber Company was using Ross carriers? A. I couldn't say. [457]

Q. You don't have any recollection whatsoever in your mind as to when you first acquired that knowledge, is that your testimony?

A. Yes. It was a number of years ago, though.

Q. Was it before or after you learned that defendant Clark & Wilson Company were using Willamette carriers also? Do you remember now about how long before?

A. No, because I don't know when Clark & Wilson got *there* Willamettes, so I couldn't say.

Q. Well, do you remember the length of interval between the time when you learned of these Ross carriers and the time when your company inspected Clark & Wilson's Willamette carrier?

A. That was quite a number of years. I don't know exactly.

Q. Roughly, would you say something like three or four years?

(Testimony of Walter E. Ballantyne.)

A. I would just have to guess. That would be, I suppose, as good a guess as any, if you want me to guess.

Q. From your familiarity with the carrier business in your work with the company you have known that Ross carriers have been sold in and around Portland for a good many years, is that true? A. Yes.

Q. You have seen them around the various lumber companies and other places in and around Portland for quite a long time, haven't you?

A. I never got a good look at a Ross carrier until about six months ago. I had seen them from a distance.

Q. For a considerable period of time?

A. For several years anyway.

Q. Now, in your testimony you have referred to other machines investigated by your General Superintendent and I think you [458] were referring to Willamette-Hyster machines. Will you name the first of these other Willamette-Hyster machines which were inspected by your General Superintendent or anyone on behalf of your company?

A. I couldn't name the first. I don't know which place he went first.

Q. Well, will you tell us all of the places they went to inspect machines, then we will get to the matter of time later. Will you name the various Willamette-Hyster machines which have been inspected by your company, as far as you know?

(Testimony of Walter E. Ballantyne.)

A. Inspected Clark & Wilson; and there was one at Forest Grove—I wouldn't be certain, but I think that is the Simpson Lumber Company; and there was one at Cottage Grove, and I know that he inspected one at Inman-Poulsen.

Q. When you say "he" you refer to the General Superintendent?

A. The General Superintendent, Mr. Waters.

Q. When did Mr. Waters inspect the Inman-Poulsen machine?

A. Several times, I believe. I couldn't say when, but within the last year.

Q. About what time would you say he inspected the machine at Cottage Grove?

A. Within the last year.

Q. Is that also true with respect to the machine at Forest Grove, the Simpson Lumber Company?

A. It is.

Q. Now, as to any of those different instances did you learn of any trouble or difficulty which Mr. Waters had in gaining access to these machines for inspecting them? A. He didn't tell me of any.

Q. As to each one of those machines which Mr. Waters inspected do you know how your company happened to find out that those machines were available for inspection? [459]

A. No, I couldn't say I do.

Q. Do you remember of any efforts or difficulties which the company contended with in finding out where these various machines were to be inspected?

A. No.



(Testimony of Walter E. Ballantyne.)

Q. Has your company always maintained records such as those you have produced here and which are now in evidence as Defendants' Exhibit 45 showing the dates of sale of carriers?

A. They have.

Q. Have you got the records concerning the sale of two hydraulic carriers to the Clark & Wilson Lumber Company?     A. I have, I think.

Q. Will you produce that record?

A. The Court has my record book.

Q. Will you point out the part in that record book, if you please, which shows the record of sale of two hydraulic carriers to defendant Clark & Wilson?

(The witness here indicated, without comment, a place in said book.)

Q. The record which you have produced reads as follows: "one, Clark & Wilson Lumber Company, March 1st, 1923. One, Clark & Wilson Lumber Company, June 1st, 1923." Do those entries indicate that the two hydraulic Gerlinger carriers which I asked you about were delivered to Clark & Wilson Lumber Company on those dates respectively?

A. Approximately those dates, yes.

The Master: That was in June and what other month?

Mr. Fryer: March 1st, 1923, and June 1st, 1923. That is all.

The Master: Any redirect.

Mr. Geisler: Yes, your Honor.

(Testimony of Walter E. Ballantyne.)

Redirect Examination

By Mr. Geisler: [460]

Q. In your cross examination, Mr. Ballantyne, you referred to entries in your record with regard to the sales of mechanical lift lumber carriers, and specifically to RPN. Did you make any other sales—

The Master: RPF, I think.

Mr. Geisler: RPF, thank you. Did you make any additional sales recorded in your book of mechanical lift besides those?

A. I did. What—

Q. What was the general term under which you sold lumber carriers of that particular type?

A. Well, they were all mechanical lift, but they were different; we called them different models, although they were all RP, which stands for “rack and pinion”.

Q. Oh. Would you please in that regard now point out to the Court the additional entries in regard to these other sales of mechanical lift carriers.

(The witness, without comment, here indicated a place in said book.)

The Master: I shall mark these 10, 11 and 12.

Mr. Geisler: Very well, your Honor.

The Master: They are not offered in evidence, and I just simply mark them for reference. Those are the last three pages in the book.

Mr. Geisler: Very well. Those were of lumber carriers, were they?      A. Yes, sir.

(Testimony of Walter E. Ballantyne.)

Mr. Geisler: We offer those additional pages of the record in evidence.

Mr. Fryer: We have no objection.

The Master: It becomes Complainant's Exhibit 46, three sheets back in the last three pages of the book marked 10, 11 and [461] 12, and I take it that photostats will be substituted in place of those?

(The three sheets referred to were thereupon received in evidence and marked Complainant's Exhibit 46, a photostatic copy thereof to be substituted for the original.)

(Witness excused.)

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### JOHN L. WATERS

thereupon resumed the witness stand, and was examined and testified further as follows:

#### Cross Examination

By Mr. Fryer:

Mr. Fryer: May I ask that the witness be handed Plaintiff's Exhibit 2, please. From your inspection of the drawings of the patent in suit, Exhibit 2, is it your understanding that the reversing clutch 47 is shown more or less diagrammatically, without the details of its interior construction?      A. Yes, sir.

Q. The patent drawings as you understand them show a housing and an operating lever 48 extend-

(Testimony of John L. Waters.)

ing therefrom, that whole representation being intended merely to indicate that any suitable form of clutch or controlling mechanism shall be used at that point, is that your understanding?

A. Any kind of controls that will operate the reversible type of clutch.

Q. That is without showing the interior mechanism of this arrangement, the patentee merely prescribes that at this point in his mechanism he shall have a power-controlling device which can be set in neutral or forward or reverse position by the use of an operating member like 48, is that your understanding?

A. Yes, sir.

Q. And you would say, then, that an equivalent of this arrangement 47 and 48 of the patent in suit would be any power-con- [462] trolling mechanism there which would have suitable mechanism by which the operating lever could be placed either in neutral or could transmit power in one direction or in the opposite direction, is that your understanding?

A. Yes, sir.

Q. From your study of the patent in suit is it your understanding that the bar 67 functions to place the clutch in neutral only in the event that a load engages the bar 67 and pushes it up the proper distance to accomplish that purpose?

A. Yes, sir.

Q. Do you also understand that in the defendant's Willamette-Hyster machine the clutch will be placed in neutral to terminate upward movement



(Testimony of John L. Waters.)

of the load-lifting device irrespective of any load in the machine?      A. Yes, sir.

Mr. Fryer: May I see Exhibits 38-A, 38-B and 38-C, please?

Q. In expressing your opinion in your previous testimony to the effect that you found the combination of the patent in suit in the accused Willamette-Hyster machine, did you use, in formulating that opinion, the drawings of the Willamette-Hyster construction, Plaintiff's Exhibits 33 and 34?—and may the witness be shown these please? The large charts, your Honor.      A. Yes, I did.

Q. You relied upon your understanding of the drawings Plaintiff's Exhibits 33 and 34 as part of the factors upon which you predicated that opinion?

A. Yes.

Q. And you were able to understand the accused construction [463] by the use of those drawings Plaintiff's Exhibits 33 and 34?

A. Well, the details, the exact details, are not shown. They are not—the actual construction as they are on the carrier no doubt varies some from that, but it conveys the idea and there is no question in my mind, after examining these drawings, as to what the purpose and result of the combination involved in the drawings.

Q. In other words, you find enough in these drawings, plaintiff's Exhibits 33 and 34, to enable you to express your opinion that the mechanism

(Testimony of John L. Waters.)

shown on those drawings embodies the combination of the claim in suit, is that right?

A. That is right, yes, sir.

Q. You have everything you need for that purpose shown on these two drawings, Plaintiff's Exhibits 33 and 34?

A. Well, as I have said before, there is sufficient information on that to enable me to form an opinion as to the operating of the device.

Q. You are able to do that, I suppose, because of your experience with carrier construction and operation generally, is that true?

A. Well, naturally, being familiar with mechanical construction, it is very apparent to me the purpose and result of this combination of elements.

Q. How much experience have you had with carrier construction in general?

A. Well, I have been with the Dallas Machine & Locomotive Works for eight years, since 1928, July of 1928.

Q. Has your experience there been confined solely to carriers made by the plaintiff?

A. No, sir.

Q. You have not had anything to do with any other types of carriers have you?

A. No other carriers, no. [464]

Q. So that all that you know from a practical standpoint is solely the carrier of the plaintiff?

A. Yes, that is the only carrier that I have had any experience with.

(Testimony of John L. Waters.)

Q. The only one that you have ever seen?

A. No, sir.

Q. Have you ever seen any other carrier than those made by the plaintiff?

A. I have seen the Willamette-Hyster machine.

Q. That is the one which you have considered here to determine whether or not it was an infringement?

A. Yes, sir.

Q. Those are the only two carriers, then, that are embraced within your experience in the carrier business, is that right?

A. No, I wouldn't say that. I have seen the Ross machine, but I have never given it close examination or any more than just a casual glance, you might say.

Q. Where did you ever see a Ross carrier?

A. I have seen the Ross carrier at Inman-Poulsen. However, I have inspected one machine at Inman-Poulsen's, the Ross machine.

Q. Did you see it work?

A. No, sir.

Q. Did you inspect it closely enough to be able to recognize a photograph of it if you saw it?

A. Possibly.

Q. I will ask you to look at the photographs Defendants' Exhibits 38-A, 38-B, and 38-C and state whether or not the carrier shown in those photographs is construction which in your opinion is the same as that which you saw at Inman-Poulsen?

A. No, this construction is not the same.

Q. In what respect does it differ?

(Testimony of John L. Waters.)

A. The brake mechanism.

Q. You mean the automatic brake mechanism colored orange on [465] those photographs?

A. Yes.

Q. Explain a little more definitely how the brake mechanism colored orange on the photographs Defendants' Exhibits 38-A, -B and -C differs from that which you saw in the machine at Inman-Poulsen?

A. The machine I saw at Inman-Poulsen had no controls; didn't have any of the controls as shown on this photograph in the machine that I inspected.

Q. Did the machine at Inman-Poulsen have a brake automatically applied when the clutch went into neutral?      A. No, sir.

Q. It didn't have any such brake?

A. No, sir.

Q. Was it an electric machine?      A. No, sir.

Q. It was gas-powered?      A. Gas-powered.

Q. Have you had sufficient experience in carrier construction and operation to formulate any opinion as to whether or not the carrier construction shown on the photographs 38-A, -B and -C contains the combination of the claim 4 in suit—and in that respect I might explain to you that the colored portions on that photograph are as follows: The purple represents load-lifting means, the brown-colored member is a manual means for operating the clutch, the brake mechanism you have already identified and the red-colored mechanism are stops con-



(Testimony of John L. Waters.)

tacted by the purple load-lifting means and throw the yellow-colored friction clutch into neutral at upper and lower predetermined limits of travel of the load-lifting means.

A. Do I understand you correctly that the yellow parts indicate the clutch mechanism?

Q. The yellow parts include the clutch and generally indicate [466] means for transmitting the power of the engine to the purple load-lifting means, and the clutch is included in that yellow structure.

A. May I have the question again, please?

Q. I may reframe it for you, to make it shorter, because the last question has been somewhat chopped up. I will ask you to state whether or not, assuming that in the photographs before you the purple structure is a load-lifting means, the yellow structure is a means for transmitting power from the motor to the load-lifting means, including a friction clutch, reversible and capable of being set in neutral, the brown mechanism represents a hand lever for operating that clutch, the red means are limit stops which automatically push the clutch to neutral when the load-lifting means reaches predetermined upper and lower limits, and the orange means is a brake mechanism automatically applied whenever the clutch is placed to neutral—with that assumption, will you state whether or not that carrier mechanism which you have before you in those exhibits would, in your opinion, contain the combination of the claim here in suit?

(Testimony of John L. Waters.)

A. Well, I don't see enough information on the three drawings to enable me to state definitely the function of each part as you have described. I would——

Q. Those photographs of an actual machine do not convey as much to your mind as the drawings Plaintiff's Exhibits 33 and 34, is that right?

A. That is right.

Q. Well, if you were to assume the construction and operation of the machine on the photographs 38-A, -B and -C to be as I have stated, would you then be still unable to express an opinion as to whether it contained the combination of the claim in suit? [467]

A. If they function as you state they would embody the claims as outlined—the elements as outlined in our claim.

Mr. Fryer: No further questions.

### Redirect Examination

By Mr. Geisler:

Q. Some question has arisen as to what the part marked X on Defendants' Exhibit 25—— Now, can you tell us what that part X is?

A. My opinion is that this operation is a part of 21, the rack bar, I believe it is.

Q. Who did the coloring of these enlarged photostats of the Plaintiff's drawings, the patent drawings?

A. Mr. Fritz, working with the Dallas Machine & Locomotive Works, an assistant to Mr. Dimick.

(Testimony of John L. Waters.)

Q. Looking at Figure 1, Figure 1 of Plaintiff's drawings, patent drawings, as shown there by that Exhibit 26, Defendants' Exhibit 26——

The Master: That is the righthand one.

Mr. Geisler: The righthand side—will you kindly explain the meaning of those parts colored red extending horizontally?

A. According to our intention in coloring them, the parts colored red were to indicate the clutch control. However, there appears to be an error in the color of this section, which, in reality appears to be 21 rather than a clutch control.

The Master: Draw a line down from that portion there and mark that X so that both drawings will be the same.

(Witness does as requested.)

Q. (By Mr. Geisler): Now what is that part to the right of X, also colored red?

A. This part is the lever, clutch lever 48, I believe is the number. I would have to refer to the drawing of the other view. It is not numbered on this view.

Q. Look at that drawing before you, to the left, on that drawing there. [468]

A. Yes, 48.

Q. I call your attention to Figure 2 of Plaintiff's patent drawings and take the large photostat thereof, Plaintiff's Exhibit 27; will the bailiff kindly put it up. Some question has arisen as to what the part or construction is which looks like

(Testimony of John L. Waters.)

an inverted U over the part marked 67. Can you tell us what that construction is over 69, marked 69, referred to over the part 69?

A. Do you refer to this (witness indicating)?

A. Yes. 69 indicates the cam on the upper end of bar 67, the purpose of which is to move the lever 48 upon movement of the bar 67.

Q. Just a minute. I asked you if you could tell me the construction of that U-shaped piece or U-shaped lines which surround 69, Mr. Waters. What does that indicate?

A. The outer line indicates an opening in a deck plate permitting the cam to project up through the deck from below.

Q. I call your attention to the following paragraph of plaintiff's patent specification, being Plaintiff's Exhibit 2, reading at lines 28 to 36, inclusive, on page 2. I will read it so that we may all have it before us; "A member 67 extends across the machine in position to be engaged by the load as it rises and is pivoted at 68. It has an arm with a cam shaped upper end 69 which engages the clutch lever on its upward movement and throws it to neutral position, thereby stopping the movement of the lifting mechanism as explained above for the downward movement." Does this statement give to you a clear understanding of what the construction and cooperation of the parts referred to are?

A. Yes, sir.



(Testimony of John L. Waters.)

Q. I refer you to the sketch made by Mr Dimick. I have not the reference number of that.

The Master: 37. [469]

Q. You may state if you have examined that sketch carefully.      A. Yes, sir.

Q. If you were to build a lumber carrier from the specification of Plaintiff's patent, Plaintiff's Exhibit 2, how would you make the arrangements of the parts referred to in following strictly the instruction, as I say, following strictly the instruction of the paragraph of plaintiff's patent, namely, page 2, lines 28 to 36? You may, in answering that question, refer, or not refer, to that sketch that you have in your hand.

A. I would make them substantially the same as they appear on the sketch.

Q. Plaintiff's Exhibit 37?      A. On 37, yes.

Q. (By Mr. Geisler) Now with reference to that sketch, Plaintiff's Exhibit 37, will you please describe your understanding of what that sketch shows with regard to the parts and their operation as applied to plaintiff's patent drawings.

A. This sketch indicates lever 48, which is the lever controlling the clutch, the throwout of the clutch. 69 indicates the cam which is attached to crossbar 67 and as the bar 67 is raised upon contact with the load it causes cam 69 to contact member 48 and move it to the left, as shown on this drawing.

(Testimony of John L. Waters.)

Q. You have referred to the cam portion 69?

A. I beg pardon?

Q. You have referred to the cam portion 69?

A. Yes. 69 is attached to bar 67.

Q. Now in your opinion as a practical mechanic, state whether or not the interpretation which you gave of paragraph on page 2, lines 28 to 36, plaintiff's patent, is such an interpretation as you would expect any practical mechanic to make of that same paragraph.

A. Yes.

Mr. Geisler: That is all.

Mr. Fryer: No questions.

(Witness excused.) [470]

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### H. N. DIMICK

was thereupon recalled as a witness in behalf of the plaintiff herein and, having been previously sworn, was examined and further testified as follows:

#### Direct Examination

By Mr. Geisler:

Q. I will read from page 375 of the transcript of testimony, in which appear the following questions and answers, and ask you to pay attention carefully and say whether there is any correction that you wish to make in regard to your answers.  
“Question: Now, have you in your own mind any

(Testimony of H. N. Dimick.)

clear conception of how the part 67 is hung in the drawings of the patent Exhibit 2 in as far as its pivotal mounting is concerned? Answer: Yes. Question: How was that mounting arranged? Answer: Well, there was—you say so far as the drawing is concerned? Question: The drawing of the patent Exhibit 2. Answer: Well, the drawing of the patent Exhibit 2—you refer to this drawing, is that right? Question: Any of the drawings of the patent in suit, Exhibit 2. Answer: Well, on this 27, Exhibit 27 here, there are no means of hanging that bar shown in this particular drawing that I can find. Question: Well, can you find any such means anywhere in the patent Exhibit 2 which gives you any idea on that subject? Answer: No, I see nothing there that would indicate a hanger.”

A. Well, in listening to the reading of the transcript I see that I made an error in deciphering just what was meant between the Exhibit, the patent, Exhibit 2, and Figure 2 in the photostatic enlargement, Exhibit 27, and in answering that I found no means for hanging the bar 67 I was referring only to this Figure 2, Exhibit 27, and instead of referring to Exhibit 2 of the patent drawings. I had the two terms mixed, Exhibit 2 and Figure 2, and I would like to make the correction to the error, that in Exhibit 2 of the patent drawings I could find, if I had the Exhibit 2 here—— [471]

(Exhibit 2 was here passed to the witness.)

(Testimony of H. N. Dimick.)

Q. Find what please? You said you could find; you didn't complete it?

A. A means of hanging or pivoting the bar 67.

Q. Proceed.

A. And looking now at Exhibit 2 and the drawing, Figure 1 in Exhibit 2, I find a means shown and indicated by the figure 68, the number 68, to indicate a means of hanging or pivoting the bar 67.

Mr. Geisler: That is all.

The Master: Any question?

Mr. Fryer: No questions.

(Witness excused.)

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### RONALD SHEPHERD

was thereupon produced as a witness in behalf of the plaintiff herein, and, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Geisler:

The Master: State your name and address.

The Witness: Ronald Shepherd; 2555 Northeast Forty-eighth avenue, Portland, Oregon.

The Master: You may proceed.

Q. (By Mr. Geisler) You may state what has been your training, if anything, along mechanical lines.



(Testimony of Ronald Shepherd.)

A. I served my apprenticeship with the Elderdempster Shipping Company in the drafting room and in the shops. I have worked for the U. S. Lighthouse Department in the Customs House, and with the U. S. Army Engineers, and also with the Beall Pipe & Tank Corporation as a draftsman, shop foreman, and with the Washington Tire Groover Corporation as a designer. [472]

Q. What technical training did you have?

A. Mechanical Engineering Course, later supplemented by I. C. S. correspondence work.

Q. Have you had any experience with patent matters, with regard to reading drawings and specifications of patents?

A. Yes. I have worked more than a year at patent work.

Q. For whom was that?

A. With the U. S. Army Engineers and with the firm of T. J. Geisler.

Q. Have you studied the manual here, so-called Service manual, of the defendant, which is Plaintiff's Exhibit 32 and which is shown in the drawings of defendant's Service Manual? I think that is Exhibit 32.

A. Yes, I have studied that manual.

Q. And you are familiar with it? A. Yes.

Q. State whether or not you went down to inspect an actual machine manufactured by the defendant Willamette-Hyster Company.

A. I did.

(Testimony of Ronald Shepherd.)

Mr. Fryer: Just a minute. We object to this line of examination, if your Honor please, on the ground that it is very evidently the third repetition, I believe we have had, by three different witnesses, attempting to show similarity between the patent in suit and the accused structure. Usually one expert witness is sufficient, and here this is going to make our third, as I recall the record, and I think it is an unnecessary duplication of proofs. We ask for the usual order restricting the number of experts to a side to at least two, anyway.

Mr. Geisler: We have really introduced so far, your Honor, witnesses with regard to facts only; that is, to say what the construction was of the defendant's lumber carrier, and what, if any, similarity there is thereto. [473]

The Master: I shall overrule the objection. You may proceed.

Q. You may state whether or not the machine, lumber carrier manufactured by the defendant Wilamette-Hyster Company, carried in substance the same construction as is shown there by Plaintiff's Exhibit 35.

A. Yes, it had substantially the same construction.

Q. You may state whether in the defendant's machine that you saw you found load lifting means mounted therein?

A. I did.

(Testimony of Ronald Shepherd.)

Q. Did you find means for transmitting motion from a source of power with a load lifting means comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction?      A. Yes, I did.

Q. Did you find any means for manually moving the clutch to operative position?      A. Yes.

Q. Did you find therein automatic means for moving the clutch to [474] neutral position upon a movement of the load lifting means to a predetermined extent in either direction?

A. Yes, I did.

Q. Did you find therein means for braking the transmission means whenever the clutch is moved to neutral position?      A. Yes, I did.

Q. And you may state whether the means that I have referred to which you state you saw in the defendant's lumber hoist, lumber carrier, were or were not as shown in those drawings of the defendant's manual.

A. Yes; the entire mechanism seemed to be exactly the same as shown in the two drawings.

Q. I show you here a copy of a patent and ask you to state whether or not you have seen that patent before, if you have studied it.

A. Yes, I have studied this patent.

Mr. Geisler: I offer in evidence a patent issued to G. A. Grab, Gustav A. Grab, December 29th, 1931, No. 1,838,939.

(Testimony of Ronald Shepherd.)

Mr. Fryer: We object to the offer, if the Court please, on the ground that a patent issued to a stranger to the suit would have no materiality or relevancy to the plaintiff's case. I don't know whether it is supposed to be a prior art patent, or whether it is supposed to be anything that the plaintiff is suing on. Certainly it is not the patent in suit and would have no materiality or relevancy whatsoever to the case, and we object.

The Master: What is the relevancy of it, Mr. Geisler?

Mr. Geisler: Why, it appears right on the face of it, your Honor, that this patent is held by assignment by the defendant here in suit, and it bears directly on the question of infringement, as I will be able to connect.

Mr. Fryer: The law is very clearly to the effect that no matter how many patents the defendant may have, none of them are any proof of infringement. The fact that the defendant may have a patent showing a given construction is not even circumstantial evidence that the de- [475] fendant ever made or is making anything shown in that patent, and it could have no materiality whatsoever.

Mr. Geisler: I have here the assignment from Mr. Grab to the defendant, and of course if there are any statements in that, whatever statements Mr. Grab made necessarily by adoption would bind the defendant in suit, because they are assignees and



(Testimony of Ronald Shepherd.)

they took that patent with all the notice that the record conveys.

Mr. Fryer: The patent is not an admission, if your Honor please, either by the patentee or by the grantee. There is no rule of law to that effect. And it is not evidence of infringement; it is not evidence of any manufacture on the part of the defendant. None of the reasons advanced by counsel would have any materiality, and we object to it on the ground it is not material or relevant.

Mr. Geisler: It would appear from this patent, if your Honor please, that the construction there described is substantially as shown in the manual of service issued by the defendant, and the relevancy of it will appear as the facts are developed.

The Master: Well, I shall receive it subject to that proof.

(Said Patent No. 1,838,939 issued to G. A. Grab, was thereupon received in evidence and marked Complainant's Exhibit 47.)

Mr. Geisler: We have certified copies of the assignment of that patent to the defendant.

Mr. Fryer: We don't deny that the defendant owns the patent, your Honor.

Mr. Geisler: I want to prove by that the date when the assignment was made.

Mr. Fryer: Well, we will agree to that also.

(Testimony of Ronald Shepherd.)

Mr. Geisler: You agree to the fact that the assignment was made while this patent application, which matured—— [476]

Mr. Fryer: Well, if you give me the date of the assignment I will see if I can stipulate to it.

Mr. Geisler: I will give you the date of the assignment, yes.

Mr. Fryer: Have you the assignment there, Mr. Geisler?

Mr. Geisler: We will find it in just a moment. But this particular patent was assigned to the Wilamette Iron & Steel Works, with reference to the application in this patent which matured in Patent No. 1,838,939. That assignment was made August 31st, 1927. The application was made,—that is to say, there was an original application, your Honor, which was filed July 23rd, 1927, under Serial No. 207,873, and that was afterwards substituted by the later application which matured into this Grab patent. That later application was filed May 28th, 1930. Now the assignment was made with reference to the original application and the date of the last assignment is August 31st, 1937.

The Master: 1927, you mean?

Mr. Geisler: 1927; yes, your Honor; and it conveys the full and exclusive right to said invention.

Mr. Fryer: Now if you will show me the assignment you refer to I will stipulate to that date, if you care to have such a stipulation.

(Testimony of Ronald Shepherd.)

Mr. Geisler: Just a moment. Inadvertently it seems I left those assignments on my desk.

The Master: Well, you bring them in at the two o'clock session.

Mr. Geisler: Yes, your Honor.

The Master: And the stipulation can then be entered into.

Mr. Geisler: Yes.

The Master: You may proceed then with the next matter of your examination.

Q. (By Mr. Geisler) Now have you studied that patent which I [477] have just referred to, Plaintiff's Exhibit 47, the patent being No. 1,-838,939?      A. Yes.

Q. Are you familiar with the description of the parts therein?      A. Yes.

Q. You may state whether or not the description of the parts mentioned in this patent, Plaintiff's Exhibit 47, have or have not any similarity with the devices as shown in the drawings of defendant's Service Manual?

A. With one or two exceptions they are practically the same.

Q. Now by referring to that patent you may point out the parts of the drawings of the Service Manual which are substantially the same.

A. The mechanism is controlled manually by a hand lever which is shown on Figure 5 of the patent drawing by number 48, which seems to correspond

(Testimony of Ronald Shepherd.)

to HL on the enlarged drawing number 2 of the defendant's machine. The hand lever 48 is for the purpose of turning a shaft 47 on the patent drawings, which is indicated by IS on drawing No. 2. Moving of the hand lever in either direction oscillates a crank mounted on the end of the shaft 47 designated by number 46 in the patent drawing and the letters IL on drawing No. 2. To the end of this crank 46 is pivotally fastened a rod 45 on the patent drawing, compared to L on drawing No. 2. This rod continues back to a position adjacent the clutch and brake mechanism shown by drawing No. 1 and the rod 45 has a suitable fitting, crank-shaped, number 44, which is similar to the crank designated by the letters FSL on drawing No. 2. The crank 44 is fastened to a shaft 39 on the patent drawing, letter S on drawing No. 2 and also on No. 1. This short shaft is provided with threads at its opposite end, which are cut right and left hand. The purpose of the parts 39, 44, 45, 46 and 47 on the drawing No. 2, letters HL, IS, IL, L, FSL and S, is to [478] connect the hand lever shown by number 48 on the patent drawing with the clutch control mechanism shown by orange color on drawing No. 1. Therefore it is evident that in both cases the manual moving of the lever 48 in either direction will, by the associated mechanism, cause the clutch to be engaged in one direction or the reverse direction. Also to a fixed portion of the machine, which hasn't any



(Testimony of Ronald Shepherd.)

number or letter on either drawing, is attached a bell crank number 59 on the patent drawing, letter Z on drawing No. 2. To one end of the bell crank number 59 or letter Z is attached a rod 61 on the patent drawing, which is shown broken in Figure 5 but evidently extends down to shoes, load lifting shoes. The other end of the bell crank lever 59 is connected to a nut, number 57 on the patent drawing, no letter on the drawing No. 2 but shown. This nut is threaded so that it co-acts with a longitudinal threaded shaft number 54 on the patent drawing and shown in blue on the drawing No. 2. This shaft 54 has a sprocket wheel 53 mounted on its forward end the shaft 54 being rotated by means of a chain——

The Master: Rotated, you say?

A. Yes, rotated by means of a chain connected with the transmission gears, not shown but described in the patent. Incidentally, there are two similar mechanisms, the one just described being duplicated by the one on the opposite side of the machine. The nut 57 shown in blue on drawing No. 2 has an extending arm 57-A and letter EB on drawing No. 2, through which is passed a rod 66 in the patent drawing, letters GB on drawing No. 2. This rod No. 66 has two stops 68—three stops, rather, 68, 77, 76. The stops are so placed——

Q. (By Mr. Geisler) Do you find similar stops on drawing No. 2?

(Testimony of Ronald Shepherd.)

A. Yes, there are two of them shown on drawing No. 2 indicated by the same letters LS. The end of the rod 66 in the patent [479] drawing is attached to a pivotal lever 72 on the patent drawing. On drawing No. 2 the rod is attached directly to the crank arm IL. There is a slight difference there in mechanical construction that, while being different on result of the operation of the mechanism, is practically the same. In both cases the rod 66 is connected with a shaft 47 so that any movement of the lever 48 will cause the rod 66 to move forward and backward in a longitudinal direction for manual operation. However, rotation of the sprocket wheels 53 and the shaft, threaded shaft 54, causes the threads on the shaft 54 to co-act with the threads in the nut 57 and according to the direction of rotation thus causes the nut to travel along the thread in axial direction thus through the medium of the bell crank 59, which is indirectly attached to the nut to cause the rod 61 or the part colored in blue on the drawing No. 2 to be raised or lowered. In other words, this is the means of raising and lowering the means provided for lifting the load. At the forward end of the rod 66 is attached a stop 68, or one of the stops LS on drawing No. 2. It is evident that when the socket 53—sprocket 53 and the shaft 54 are rotated so that the nut 57 is caused to travel toward the sprocket 53, the arm 57-A, or EB, attached to the nut will contact the stop 68 or one of

(Testimony of Ronald Shepherd.)

the letters LS and cause the rod 66 to be moved longitudinally. This rod 66, or EB, previously described, being connected to the shaft 47 and hand lever 48, or IS and HL, will cause the hand lever to be pulled into the neutral position, or, in fact, pulled into any position, depending on where the stop 68 is mounted on the rod. In this particular case it is mounted on the end of the rod 66, so that when the load lifting means has reached a predetermined lower level the hand lever and associated mechanism, including the friction clutch, is brought into its neutral position. A similar stop designated by 77 on the patent drawing and the other [480] character LS on drawing No. 2, serves in like manner to limit the upward travel of the load lifting means, this entire mechanism providing an automatic stop for the load lifting means.

Q. (By Mr. Geisler) In speaking this morning, referring to drawings numbers 1 and 2, getting them into the record, you referred to what was marked Plaintiff's Exhibits 33 and 34, is that right, Mr. Shepherd? A. Yes.

Q. You may state whether the Grab patent, Plaintiff's Exhibit 47, contained automatic means for stopping the lifting mechanism when it had reached its predetermined uppermost limit, both without a load and with a load?

A. Yes, the Grab patent shows that.

(Testimony of Ronald Shepherd.)

Mr. Geisler: For convenience of looking over this one of the drawings of this Grab patent I would like to offer in evidence an enlarged photostat of Figure 5 of that patent.

Mr. Fryer: We object to it, if Your Honor please, upon the same grounds stated in our previous objection, that a patent owned by defendant is no proof whatsoever of what the defendant has made or used, and for that reason it is not material or relevant.

The Master: Upon the same conditions as regards the admission of the patent the objection will be overruled for the time being.

The Master: That will become Exhibit 48, Complainant's Exhibit 48.

(The enlarged photostat referred to was thereupon received in evidence and marked Complainant's Exhibit 48.)

Q. (By Mr. Geisler) Now, you may state what kind of specific devices the lumber carrier of the Willamette-Hyster Company which you saw had for stopping the lifting mechanism when it had reached its uppermost limit of travel? [481]

A. The Willamette carrier that I saw had precisely the same means for limiting upward travel as is shown by the Grab patent and also by drawing number 2 previously described.

Mr. Fryer: Now, unless it is understood that in the answer the word "Willamette" means Willa-



(Testimony of Ronald Shepherd.)

mette-Hyster Company, I move to strike the answer as not responsive, because "Willamette" might apply to a number of manufacturers, whereas "Willamette-Hyster" is the only one that is pertinent to this inquiry and responsive to the question.

The Master: Do you refer to Willamette-Hyster?

Mr. Geisler: The Willamette-Hyster. I thought I had said so.

The Master: Very well, that may be understood and the record will show it.

Mr. Fryer: Very well, your Honor.

Mr. Geisler: Now, I offer in evidence the assignment, certified copy here, by the patentee as assignor, Gustav A. Grab, to Willamette Iron & Steel Works of the entire right, I think it says here, something of that kind.

Mr. Fryer: We have no objection to it, if your Honor please, except its materiality upon the grounds previously urged and say that the document has no materiality whatsoever to the cause.

The Master: It will be received. At the end of the case, at the end of the testimony, I shall ask counsel to represent their objection, if they may—it may become material in the meantime—and I will pass upon it.

Mr. Geisler: I offer, your Honor, the assignment of the same patent from the Willamette Iron & Steel Works to the Willamette-Ersted Company, which was the former name of the defendant Willamette-Hyster Company.

(Testimony of Ronald Shepherd.)

Mr. Fryer: We make the same objection to that offer. [482]

The Master: It will be the same ruling, upon the same ground. The assignment to the Willamette Iron & Steel Company becomes Complainant's Exhibit 49, and the assignment from the Willamette Iron & Steel Company to the Willamette-Ersted Company becomes Complainant's Exhibit 50.

(The two assignments referred to were thereupon received in evidence and marked, respectively, Complainant's Exhibit 49 and Complainant's Exhibit 50.)

Mr. Geisler: I now offer in evidence the file wrapper and the contents of patent number 1,838,939, dated December 29, 1931, granted to Gustav A. Grab, assignor by mesne assignments to the Willamette-Ersted Company.

Mr. Fryer: The defendants make the same objection to that offer.

The Master: The same ruling. It will become Complainant's Exhibit 51, on the same conditions.

(Said file wrapper was thereupon received in evidence and marked Complainant's Exhibit 51.)

Mr. Geisler: You may take the witness.

The Master: Proceed.

(Testimony of Ronald Shepherd.)

Cross Examination

By Mr. Fryer:

Q. What is your age, Mr. Shepherd?

A. Thirty-four.

Q. Do I understand that you have been connected at some time or other with the manufacture of lumber carriers?      A. No.

Q. Have you ever operated lumber carriers?

A. No.

Q. Have you ever had anything to do with them——      A. I have seen them in operation.

[483]

Q. Just a moment, please, and wait until the question is completed. May I have the question read up to the point where the witness interrupted, please?

The Reporter (Reading): “Have you ever had anything to do with them——”

Q. (By Mr. Fryer) —prior to your connection with such mechanisms for the purposes of this suit?

A. No.

Q. You say you were connected with the Army Engineering Department at sometime?

A. I was.

Q. Between what dates?

A. Between October, 1935 and May, 1936.

Q. Did that work for the Army Engineering Department occupy all of your time?      A. Yes.

(Testimony of Ronald Shepherd.)

Q. After severing your connection with the Army Engineering Department in May of 1936 what did you do?

A. I was employed for a few weeks by a structural engineer in town in the design of a steel building at Marshfield.

Q. How long did that work occupy you?

A. Three or four weeks, as near as I can remember.

Q. After that what did you do?

A. Then I was employed by Mr. Geisler.

Q. That is the counsel for the plaintiff here in this cause?      A. Yes, Mr. Geisler, Jr.

Q. Whom do you mean by Mr. Geisler, Jr.?

A. Mr. L. R. Geisler, Mr. T. J. Geisler's son and his associate.

Q. Mr. Geisler, Jr., as you describe him here, is associated with Mr. T. J. Geisler, the plaintiff's counsel in this cause?      A. Yes. [484]

Q. When you were employed in that office what were your duties in the office?

A. Well, I should say to act as intermediary between the inventor and the attorney to discuss an invention with the inventor and present it in such a form and make the necessary drawings that would indicate the matter plainly to Mr. Geisler.

Q. You commenced that employ about in July or June of 1936?      A. Yes, as near as I can—



(Testimony of Ronald Shepherd.)

Q. Prior to that time had you done any work in connection with the prosecution or obtaining of patents?      A. Yes.

Q. Where at?

A. With the U. S. Army Engineers.

Q. And in that Army Engineering Work what did you have to do with patents?

A. Make drawings of specific parts of the fishways construction that the Government was seeking patent on.

Q. Is that what you did for the entire time that you were employed by that Army Engineering Department?

A. No, the work was rather alternated. I would work on that part of the time and on machine design the remainder of the time.

Q. That is, for the Army Engineering Department you were making drawings to be filed in the United States Patent Office as part of applications for letters patent?      A. Yes.

Q. How many applications for letters patent did you make drawings for while employed by the Army Engineering Department?

A. I can't answer that question directly, because my part of that was purely in making the drawings, and when I left the applications had not reached the point in development where they were assigned any definite numbers or quantities. The drawings were such that they applied to various

(Testimony of Ronald Shepherd.)

parts of the [485] construction, and, of course, I had nothing to do with the filing of any application.

Q. On the drawing which you referred to in your testimony in evidence as Plaintiff's Exhibit 34 did you say that you found automatic means for moving the clutch to neutral position upon movement of the load-lifting means to a predetermined extent in either direction? A. I did.

Q. Will you point those out by reference to the reference characters applied to that on Exhibit 34, please?

A. This rod extending down and broken off is understood to be connected to a load-lifting means. When this is raised or lowered, with the understanding that this shaft is rotated, the lifting and lowering of this rod is controlled by the action of the nut running backward or forward on this threaded shaft,—

Mr. Geisler: Has that a number—pardon me—that shaft?

A. There isn't a number, Mr. Geisler.

The Master: It is referred to there in pencil by the Fig. 2.

A. By 2, yes. Due the fact that there is a projection mounted on the nut and marked EB, that projection, of course, moving with the nut laterally, it is brought to bear against stops marked LS secured firmly to a rod GB, the rod GB being ulti-

(Testimony of Ronald Shepherd.)

mately connected to the lever and back to this mechanism which operates the friction clutch.

Q. (By Mr. Fryer) You haven't answered my question, which was merely that you kindly enumerate by reference to the reference characters applied thereto those parts of the mechanism shown on Exhibit 34 which constitute the automatic means for moving the clutch to neutral position. [486]

Mr. Geisler: I beg your pardon, I think, Your Honor, that the witness has answered that question.

The Master: Well, except that he has not carried out the entire lettering, I think that is true. If counsel desires—and perhaps for the purpose of the record it is well to do so, follow that—you have gone along to the stops LS on shaft GB and its connection with the lever IL. Now, carry the rest of it through there by appropriate reference to symbols.

A. Yes. For the time being we will disregard this——

The Master: Well, now, when you say “this” it means nothing at all in the record.

A. The part, portion, marked in purple. To the end of the arm IL, to which, as previously stated, the rod G B is attached, is also attached an arm—a rod, rather, that connects with the arm FSL. The arm FSL is securely attached to a short shaft S, which is provided with opposed threads, the end of the shaft connecting with a portion of the friction clutch mechanism in such manner that when the

(Testimony of Ronald Shepherd.)

rod L, is moved actually the arm FSL is oscillated, the shaft, threaded portion of the shaft, co-acting with the nut which is fastened to the frame—it has no number—causes this shaft S to also move,—to rotate slightly, causes the friction clutch mechanism to be rocked either one way or the other depending on whichever way the rod L is moved.

Q. (By Mr. Fryer) In your direct testimony you were interrogated about some mechanism which was described to you as automatic means for moving the clutch to neutral position under certain conditions. I will now ask you to state whether you understand that the parts marked LS on Exhibit 34 are part of the means which automatically move the clutch to neutral position? Are they or are they not part of those automatic means for moving the clutch to neutral position? [487] A. They are.

Q. All right. Now, is the part Z which you referred to here on your cross examination a moment ago a part of the automatic means for moving the clutch to neutral position? A. It is.

Q. Is the part GB, a part of the mechanism on 34, one of the parts which functions automatically to move the clutch to neutral position?

A. It is.

Q. Is the part marked HL a part of the means which you have referred to as automatic means for moving the clutch to neutral position?

A. Not necessarily. HL is a hand lever.



(Testimony of Ronald Shepherd.)

Q. When you say "not necessarily" what do you mean?

A. I mean that the automatic mechanism would function without the lever marked HL.

Q. The lever HL is for operating the mechanism by hand, is that your understanding? A. Right.

Q. When the clutch is moved to neutral by hand will you state whether or not the part marked L on Exhibit 34 performs any part of the work of pushing the clutch into neutral? A. It does.

Q. Does the part marked FSL perform any part of the work of pushing the clutch to neutral when the mechanism is operated by hand? A. It does.

Q. Does the part S also function when the mechanism is operated by hand to move the clutch to neutral? A. Yes.

Q. Is that also true of the part marked IL and IS? A. Yes, it is. [488]

Q. When the mechanism is moved to neutral position by operation of the hand lever HL do either of the parts marked LS perform any work on Exhibit 34? A. No.

Q. Does the part EB perform any work when the clutch is moved to neutral position by the handle HL on Exhibit 34? A. No.

Q. So that the parts LS, EB and GB in the mechanism shown on Exhibit 34, perform work only when the clutch is moved to neutral automatically, is that your understanding? A. No.

(Testimony of Ronald Shepherd.)

Q. They work when the clutch is not moved automatically, is that your understanding?

A. One of those parts mentioned, the rod GB, would, of course, have to move when the arm IL moved.

Q. Does it perform any work, the rod GB, when the clutch is placed into neutral by use of the handle HL? A. No, it performs no work.

Q. So that none of the parts marked EB, LS or GB performs any of the work of pushing the clutch into neutral when the clutch is so moved by hand using the lever HL, is that right? A. Right.

Q. In other words, then, the parts LS, EB and GB perform work in pushing the clutch to neutral solely and only when the clutch is automatically moved into neutral position is that right?

A. Right.

Q. Will the parts LS, EB and GB automatically perform the function of pushing the clutch into neutral when there is no load in the machine?

A. Yes.

Q. Did you ever see a machine in operation having the construction shown on the Exhibit 34? [489]

A. Only at a distance.

Q. Did you ever inspect that mechanism in an actual machine at close range? A. Yes.

Q. Where was that machine?

A. Inman-Poulsen Lumber Company.

Q. On what date? A. A week ago today.

(Testimony of Ronald Shepherd.)

Q. Was that the first time that you had given that sort of mechanism any close inspection?

A. That was the first time that I had really studied the actual mechanism.

Q. Did you see any mechanism whatsoever in the machine which you inspected at Inman-Poulsen Lumber Company which functioned to move the clutch into neutral position by engagement with the load of lumber in the machine? A. No.

Q. There was no such mechanism in the machine you inspected at Inman-Poulsen Lumber Company, was there? A. No.

Q. Your answer is that there was not?

A. There was not.

Q. Is it your understanding of the mechanism shown on the chart, Plaintiff's Exhibit 48, that it contains a frame, load lifting means, a means of manually moving the clutch to operative position, means for transmitting motion from the source of power to the load lifting means comprising a clutch that can be set in neutral position to cause the load lifting means to move in either direction, and means for braking the transmitting means whenever the clutch is moved to neutral?

A. No. There is not any brake shown on this exhibit at all.

Q. Is it your idea then that the mechanism shown on this chart, [490] Plaintiff's Exhibit 48, is one substantially the same as the various mecha-

(Testimony of Ronald Shepherd.)

nisms which I referred to in my previous question, or substantially different from a machine containing those mechanisms mentioned in my question?

A. With the exception of the brake it is very similar.

Q. Well, does that make any great difference in your opinion whether the brake is included in the mechanism on Exhibit 48, or not?

The Witness: Would you mind repeating that question?

(Last question read.)

A. In view of its operations?

Mr. Fryer: What is that answer, please?

The Witness: That is a question: In view of the operation of the mechanism?

Mr. Fryer: Are you asking me a question?

The Witness: Yes, if you please.

Q. Well, I will put it this way: Will you state whether or not the construction and operation of the machine shown on the chart, Plaintiff's Exhibit 48, differs in any substantial respect from a machine containing a frame, load lifting means, means for transmitting motion from the source of power to the load lifting means comprising a clutch that can be set in neutral to move the load lifting means in either direction, a means for manually moving the clutch to neutral, automatic means for moving the clutch to neutral position upon movement of the load lifting means a predetermined



(Testimony of Ronald Shepherd.)

extent in either direction, and a brake automatically applied when the clutch is placed in neutral?

A. The addition of a brake mentioned requires of course corresponding parts which would have to be added to the exhibit, drawing shown by Exhibit 48, in order to make a mechanism similar to drawing No. 1 or Exhibit 33, similar in operation.

Q. Would you have enough mechanical knowledge and experience to add such a part to the mechanism shown on Plaintiff's Exhibit 48? [491]

A. Well, I believe I could design a brake that would work effectively on any machine, regardless of a lumber carrier.

Q. That would not be a very difficult thing to do, do you suppose?

A. Well, on the basis of my past experience, no.

Q. Well, with your mechanical training and experience, you readily would know how to add to the structure shown on Plaintiff's Exhibit 48 a brake which would be applied to the transmitting means whenever the clutch moved to neutral position?

A. Well, it would require some invention and considerable mechanical design to add a brake to that mechanism.

Q. You have made inventions of your own, have you, in the past?      A. Yes.

Q. You ever obtain any patents on them?

A. No.

(Testimony of Ronald Shepherd.)

Q. The inventions that you made were just ones that were created by you and left to go without any effort to patent them?

A. They have never been patented to my knowledge, although most of the inventions were in the line of work while gainfully employed by the government and other firms, and while they are in use I don't suppose they have been patented.

Q. That is, you personally have never made any application for patent on any of the developments you consider your inventions?      A. No.

Q. What makes you think that it would require invention to put a brake on the mechanism shown in Exhibit 48?

A. Well, because there is absolutely no provision on that drawing for a brake. There is no suggestion of a brake, or, in fact, to make a brake would be starting at the very bottom.

Q. Had you ever seen any hoisting mechanisms of any kind before you saw the hoisting mechanism about which you testified here?

A. Hoisting mechanism?

Q. Yes. [492]      A. Yes.

Q. Did you ever see any brakes on them?

A. Yes.

Q. Are they complicated mechanisms?

A. In some cases.

Q. Many of them simple?      A. Yes.

Q. Did the simple ones function satisfactorily?

(Testimony of Ronald Shepherd.)

A. That would be purely a question of an engineer's opinion.

Q. I am asking you what you saw. The ones that you saw, did they function satisfactorily, in your opinion?      A. No.

Q. But you think that to provide a satisfactory operating brake on a hoisting mechanism is something that necessarily amounts to invention; is that your opinion?      A. Yes, I think so.

Q. Now you stated that you inspected a machine which you called a Willamette-Hyster machine, which had mechanism in it which moved the clutch to neutral position by contact with the load; is that your testimony?      A. No.

Q. You never saw such a machine anywhere?

A. Only on the drawings.

Q. Did you ever see a machine having the complete mechanism shown on the chart, Exhibit 49, in it?      A. No, with one exception.

Q. What is that exception?

A. Means for preventing the mechanism rising too far with a load of lumber. In other words, the load of lumber strikes this bar, transverse bar 79, and operates the mechanism to throw the clutch into neutral.

Q. Now is it your testimony that you have or that you have not seen a machine with a bar like the bar 79 on Exhibit 48?

A. I have not seen a machine. [493]

(Testimony of Ronald Shepherd.)

Q. Can you recognize in the chart which has just been placed before you any mechanism which you saw in the Willamette-Hyster machine which you inspected at Inman-Poulsen Lumber Company about a week ago?

A. Yes. That is very similar to the mechanism.

Q. Can you state whether or not it is substantially identical in all of its parts with the mechanism which you saw in the Willamette-Hyster Lumber Carrier at Inman-Poulsen Lumber Company?

A. I would say that it is substantially the same.

Mr. Fryer: We ask to have the chart identified by the witness marked for identification as defendants' Exhibit 52.

The Master: Marked for Identification.

(The chart was thereupon marked for identification Respondents' Exhibit 52.)

Mr. Fryer: And we are handing the Court for its own use a copy of Exhibit 52.

Q. Can you see anything in the mechanism shown on the chart, Exhibit 52, which would differentiate it in any substantial way from the mechanism shown on the charts, Plaintiff's Exhibits 33 and 34?

A. The photograph, Exhibit 52, is of course a more general view. However, most of the mechanism shown on drawing No. 1 and drawing No. 2, or Exhibits 33 and 34, is pictured on Exhibit 52.



(Testimony of Ronald Shepherd.)

Q. Did you see anything on Exhibits 52, 33 and 34 which indicates to you that the mechanisms shown on those several exhibits are not substantially identical in construction and operation?

A. Yes. The nut shown on the chart 52, of course, is not as complete as the nut shown on Exhibit 34.

Q. In what respect is the nut less complete on 52 than on 34?

A. The nut shown on drawing 34 has an associated mechanism which is understood to be attached to a load lifting means, whereas the nut shown on Exhibit 52 does not show any connection with any other mechanism. [494]

Q. The associated mechanism on Exhibit 34 is a group of parts which is moved by the hand in that structure; is that your understanding? A. Yes.

Q. And that part which the nut moves is not shown in the photograph, Exhibit 52; is that your understanding? A. It is not.

Q. And apart from that difference do you find the mechanisms on 52 and on 33 and 34 substantially identical in construction and operation?

A. No.

Q. In what respect do they differ?

A. The bar rod GB is shown directly connected with the arm IL in Exhibit No. 34, whereas in this respect it operates to a slightly different type of arm; the drawing, Exhibit No. 34, of course, showing a long shaft IS, the chart 52 showing a very

(Testimony of Ronald Shepherd.)

short shaft, the chart being rather indistinct as to just what the exact construction is in that part.

Q. Would that difference which you have pointed out in your opinion materially affect the operation of the mechanism as a whole?

A. No.

Q. Now do you find any other difference which in your opinion is material from the standpoint of substantial identity of construction?

A. No. In a general way the two mechanisms, one indicated by a photograph and the other indicated by a drawing, are practically the same in operation.

Q. In the mechanism of Exhibit 48 does the part 67 perform any function in moving the clutch to neutral position when there is no load in the machine, as shown in Figure 5? That is the same as this chart.

A. No.

Q. The stops in the mechanism of Exhibit 48 which function to move [495] the clutch to neutral position when there is no load in the machine are numbered what?

A. 68 and 77.

Mr. Fryer: No further questions.

The Master: Any redirect?

Mr. Geisler: No, your Honor. We rest.

The Master: You may be excused, Mr. Shepherd.

(Witness excused.)

## MOTION TO STRIKE

Mr. Fryer: At this time the defendants move to strike from the record the patent No. 1,838,939, Plaintiff's Exhibit 47; the chart representing a view of that patent, Plaintiff's Exhibit 48; the file wrapper of that patent, which is Plaintiff's Exhibit 51; and all of the testimony of the witness who just left the stand, Mr. Shepherd, in connection with those exhibits, on the ground that they have not been connected up in any way to show that there is any materiality or relevancy between the structure of this patent No. 1,838,939 and any of the matters before the Court. In connection with the motion we also include Exhibits 49 and 50, which are certified copies of assignments pertaining to this extraneous patent of the defendant. The testimony of the witness I believe proves conclusively that there can be no materiality or relevancy to this construction.

The Master: Well, I am going to deny the motion for the time being, until I can be better advised upon that matter.

Mr. Fryer: Do I understand the plaintiff rests?

Mr. Geisler: Yes.

## DEFENDANTS' OPENING STATEMENT.

Mr. Fryer: The defendants would like to proceed with their statement, if your Honor please, at this time, and in doing that I want to advert briefly to the patents in the cause. [496]

The plaintiff corporation, of course, we are already familiar with. The suit is brought against two defendants, the Clark & Wilson Lumber Company and the Willamette-Hyster Company. The Clark & Wilson Lumber Company is engaged in lumbering operations, and in those operations it uses a large number of trucks for elevating and conveying timber from place to place. In that work it uses two different makes of machines. One group of machines operated by that defendant is made by the Ross Carrier Company of Benton Harbor, Michigan, a non-resident. Other carriers of the defendant Clark & Wilson Lumber Company are made by Willamette-Hyster Company, a local concern, and that concern has been joined with the defendant in the suit, so that we here as attorneys for the defendants represent the user of the lumber carrier, the Clark & Wilson Lumber Company, and the Willamette-Hyster Company, the Company who happens to have made some of the carriers used by the Lumber Company.

Although the issues before the Court in this cause are comparatively simple and clear cut, they are not the usual ones in patent litigation. I think perhaps that is due to the fact that some of those issues arise over defenses which the defendants have here, and those defenses are so conclusive and meritorious that they seldom arise in controversies which go to trial. Because of that situation I think a fairly detailed outline of the proofs which the defendants propose to prove and a brief reference in



that outline to the rules of law pursuant to which the proofs will be offered will be most helpful in orienting the Court and enabling it to have clearly in mind the particular issue and the rule of law under which the evidence is being presented.

The issue which I shall first mention is one which is seldom presented in the trial of a patent case, but there are many court decisions in the books dealing with it. That is the defense presented by these defendants to this effect, that the machines here accused of being an appropriation of the plaintiff's [497] patented combination and the combinations in those accused machines which are supposed to give rise to that appropriation are substantially identical in every respect with combinations found in the art prior to Gerlinger, prior to the patent in suit.

Now, the authorities or the rule of law pursuant to which our proofs are going to be offered to show that the accused machines are in essence prior art machines and therefore cannot infringe I have here on some sheets of paper and I shall hand a set of them to your Honor. Briefly, they are to this effect:

Take, for instance, the case decided by the Circuit Court of Appeals for the Sixth Circuit in *Houston vs. Brown Manufacturing Company*, the gist of that decision——

Mr. Geisler: If the Court please,—Can you give me the——

Mr. Fryer: Yes, I shall come to that—270 Fed. 445. The gist of the proceeding in that case is expressed in the following language of the Court:

“Defendant’s machines are substantially in line with the prior art and therefore do not infringe in any particular.”

A general statement of the principle pursuant to which the proofs I am now referring to will be offered is found in corpus juris at page 293 of Volume 48, as follows:

“Nor is it infringement to use something which was old, and which the public had a right to use, prior to the patentee’s invention.”

In our own Ninth Circuit Court the rule pursuant to which these proofs are going to be offered is found in a case in which our Ninth Circuit Court of Appeals said:

“The Stafford patent, No. 860,418, for a process of effecting combustion of crude petroleum, consisting in the con- [498] tinuing discharge into a confined area of liquid oil, at a distance from the point of combustion, of an oxygenous fluid under pressure sufficient to effect substantially perfect combustion, held not infringed, in that defendant’s process did not differ from those disclosed by patents prior to plaintiff’s patent.”

Mr. Geisler: Would you kindly give me the citation?

Mr. Fryer: 263 Fed. 86,—and I shall hand a copy of those excerpts and others to Your Honor.

Mr. Geisler: Also to me?

Mr. Fryer: Oh, yes, I will have a copy for you in a moment.

Now, as Your Honor can see, that defense, that is, that the accused devices are substantially identical with the prior art devices and therefore cannot infringe, is one which turns upon a pure fact question, wholly unrelated to the construction or interpretation of the patent in suit. In other words, the defendants are going to come in here and are going to present proofs which they will show are a complete demonstration that the accused combination originated in and is found in machines prior to the patentee of the patent in suit and that, therefore, it cannot be any appropriation of what his patent covers. So that we will have, then, a simple fact issue, a simple matter of comparison between the structures said to be an infringement and structures contained in the prior art. That comparison will be made by the use of charts and testimony explaining that identity.

For instance, we will have included in that art some prior patents, as, for instance, the prior patent to Towson, in which we will have——

The Master: Palson or Towson?

Mr. Fryer: Towson, (Spelling) T-o-w-s-o-n. That is a truck,—the evidence will explain that it is a truck with a positive [499] mechanical lift to raise and lower the purple-colored load-lifting means. We will also point out that that load-lifting means is

mounted for movement in a green frame. The evidence will indicate that in this mechanism there is included a yellow structure shown on the chart which is a means for transmitting motion from a source of power to the load-lifting means, including a clutch or controlling mechanism which can be set in neutral or can be set to move the load-lifting means either in an upper or lower direction. The evidence will show that this mechanism contains this red-colored series of devices comprising stops on a rod, just as we have stops on a rod in the defendants' machine, which actuate this power-controlling mechanism to set it into neutral automatically when the load-lifting means reaches a predetermined point in either direction. Other evidence of that sort will be offered throughout the first phase of the case, then we shall have a comparison between the accused construction and these various constructions in the prior art showing that in all substantial respects the accused combination of parts said to be an appropriation of something of the plaintiff's is in fact the employment of a combination found in numerous prior art structures.

With respect to this comparison, I failed to mention that it also contains the automatic brake, colored orange, which we find in all of these devices.

Now, in explanation of that evidence which we shall present I want to say something about the coloring which will appear upon all of these exhibits. The theory of the colors upon the defend-



ants' charts is that a chosen color is assigned to each of the various mechanisms making up one of the elements in the accused combination, and that color scheme is apparent with each chart as it goes in. I believe Your Honor can notice [500] that from the copies of these charts which will be handed to you as our proofs are offered.

We have in these various charts colored red the means which we find in the prior art and in the defendants' structure for automatically moving the clutch to neutral position upon movement of the load-lifting means in either direction. I particularly call Your Honor's attention to that because when we come to the patent in suit later on Your Honor will observe that in that case the only thing we can color red in the patent is the language in the claim, but nothing in the drawings of the mechanism, because there is no mechanism in the patent that really performs that function according to that language. We shall come to that further in a moment.

So that all of defendants' physical evidence in the way of charts then will have this same color scheme, which I believe will be an aid to the understanding of the operation of the mechanism as well as to the theory of our defense.

On this defense that the defendants' structure is in effect a prior art device you will find throughout that you can trace the corresponding parts by those colors in the prior patents and in the accused structure.

Now, related to that defense is another one which has found its way into this case at this time by reason of an admission in the record. Your Honor will recall the plaintiff's specific and comprehensive admission that the defendant Willamette-Hyster's small elevator or lumber carrier, about which certain witnesses were interrogated, is not an infringement of the patent in suit in any respect. Based upon that admission we shall offer proof to show that the accused construction used by Clark & Wilson is substantially identical in construction and function and mode of operation with this small Willam- [501] ette elevator or carrier which plaintiff asserts positively does not contain anything covered by the patent in suit. Naturally it will follow that if we establish that identity, as I feel confident we shall, then it will follow also that the accused device is not an infringement, because naturally if one machine does not infringe all other machines identical with it will not infringe, and the proofs in that regard will indicate this to Your Honor, that in this small Willamette carrier which we know does not contain anything covered by the patent we have a reversing clutch mechanism, colored yellow, which is interchangeable as to its parts with the reversing clutch mechanism contained in the carrier which the plaintiff contends does infringe. We have a brake mechanism, colored orange in the evidence, in the charts to be offered, which is interchangeable in the small not-infringing

elevator with the brake mechanism contained in the machine which they contend does infringe. We have in this small machine which we know is not the machine of the patent in suit mechanism, shown in red, which is so constructed that its stop mechanism on the purple-colored load-lifting means strikes that red mechanism which is connected to the yellow clutch operating means whenever the load-lifting means reaches a predetermined point in its upper or lower direction and throws the clutch to neutral and applies the brake, and that mechanism we will show is substantially identical in all respects with the corresponding stops and linkage in the carrier which the plaintiff says does contain the invention of the patent in suit.

There will also be evidence offered to show that the mere fact that in the small elevator the lumber is picked up by pushing the lifting means under the lumber from one side instead of pushing the load-lifting means under the lumber from the end [502] makes no substantial difference in construction of mode of operation of the machines whatever.

Now, on both of those issues, or, rather, both of those items of proof, which the defendants will offer, Your Honor will find that we are dealing simply with a plain fact question of identity between structures, and in measuring that question of identity we can completely turn our backs on the patent in suit. Those two items of proof require no consideration of the patent in suit whatsoever. For



instance, if the Court should find, as we contend it should, that the accused combination in defendants' carrier is substantially identical with that found in any of these prior patents, then the bill must be dismissed, and that can be done without ever taking a look at the patent, because the mere fact that this accused combination is a prior art combination is an end to the investigation.

The same is true with the defendants' small carrier, which is now a record non-infringing structure. If after considering the proofs tending to show identity which will be offered the Court should find, as we contend it should, that the two mechanisms, defendants' small elevator and defendants' large elevator, are substantially identical in construction and mode of operation, then the bill will have to be dismissed, and that can be done, again, without looking at the patent in suit whatever.

So then we shall have those two items of proof dealing with the simple fact comparison of structures, involving no consideration of the patent in suit, no interpretation of the claims and no problems of law other than the broad rule which I have called to Your Honor's attention that the prior art cannot infringe.

The next item of evidence to be offered by the defendants is also a fact question dealing with identity or [503] lack of identity between mechanical things, but this one is directed not so much to the parts themselves as to the mode of operation. The



proofs on this issue, or the proofs included in this item, will be offered pursuant to the rule which I have already had occasion to call the Court's attention to. It is expressed in the Ninth Circuit in the case of *Riverside Heights Orange Growers' Association against Stebler*, 240 Fed. 703, in the following language;

“ ‘If the device of the respondents shows a substantially different mode of operation, even though the result of the operation of the machine remains the same, infringement is avoided.’ ”

The well-known text on patent law expressed the same rule pursuant to which these proofs will be offered in this language:

“ ‘If the mode of operation of an alleged infringing thing is substantially different from that covered by the claim alleged to be infringed, it follows that the charge of infringement must be negatived; but if the mode of operation is substantially the same, it does not follow that the charge of infringement must be affirmed. In that case the question must be decided by some additional criterion. To establish an infringement of claim, the facts must be subjected to several successive tests. If the case fails on either of those tests, no further inquiry need be made; but an infringement cannot be affirmed till all those tests have been applied and have been withstood. The first of these is that which relates to identity of mode of operation.’ ”

And also some Supreme Court decisions and other Circuit Court of Appeals decisions to the same effect. I shall hand Your Honor copies of those as illustrating the rule pursuant to which the item of proof to which I am now addressing myself will be offered. [504]

On this question of mode of operation the comparison will be, of course, between the machine shown in the patent in suit and the machine contended to contain a combination identical with that of Claim 4 in suit.

I think Your Honor's attention has already been directed to the fact that the machine of the patent in suit has a very distinct and characteristic mode of operation. It is one by which the presence of a load in the machine is indispensable to operation of those mechanisms in the machine which terminate upward movement of the load-lifting device. That means is the bar which we have here heard about before, the bar 67 of the Gerlinger patent. In our proofs we shall offer evidence of the construction of this machine not only by the patent but by a machine itself illustrative of the structure of the patent, and in all of those we have colored the bar 67 black because it does not correspond with anything else in the case.

The language of the claim on this chart is colored red because it describes structure found in the prior art, but it does not describe what the patent structure really does as far as its mode of operation is concerned, but the evidence offered to explain this

structure will show conclusively that to operate the one and only machine which was ever constructed according to the drawings of that patent it is necessary to have a load of lumber in the machine, as shown in blue on the chart Exhibit 25, engaging the bar 67 at the right time and to the right extent in order to make that bar function. The evidence will indicate that should an operator place in this machine a load having a notch in it so that a portion of the load would strike the frame before the bar 67 would be engaged the machine would be destroyed. If the operator should place in the machine a load not high enough throughout its length to engage the bar 67, again the machine would be destroyed, because the rack bars would move [505] upwardly to the extent of their teeth, there would be no more teeth there, and the pinions would bump around until we have the whole thing disposed of in short time.

Now, that is characteristic of the machine of the patent. However, it is the direct antithesis of the operation of the prior art and of the defendants' accused combination. In other words this idea of the patent in suit of having something that the load comes up and pushes in order to stop upward movement of the load-lifting device was an idea that the patentee had and put in one machine but nobody ever saw or used it afterwards. All the prior art uses a lift control stop, and defendant in building of a practical machine used that type of a lift con-



trol stop and did not use this funny stop of the patent in suit which works only if you have got the right size and shape of load in the machine. In other words, the defendant has adopted the mode of operation characteristic of the prior art and foreign to the patent in suit. It has done so for obvious reasons,—it is a much better mode of operation.

So that the proofs in this regard will show that there is a fundamental, complete and distinctive difference between the respective modes of operation of the machine of the patent in suit and the defendants' machine, and for that reason the requisite identity between the patented and the accused structures is lacking, and that the bill must be dismissed.

The evidence also will show that there is nothing in this patent granted to Mr. Grab which in any way contradicts that idea. It is true that in that patent granted to Mr. Grab a bar similar to the bar 67 of the patent in suit is shown, but the mere fact that a patent was issued with a structure in it is no proof that that structure has ever been employed, and the proofs here conclusively will show that this defendant has never manufactured and used within six years prior to the filing [506] of this bill a machine containing any such construction. It has proved wholly ineffectual in operation. Anyone who has ever tried it has had to abandon it, just as the proofs already offered here show that the plaintiff abandoned its structure, as he built only one ma-



chine containing it and that machine did not stay with him very long.

Now the next group of facts which the defendants shall offer has to do more or less with the construction of the patent in suit and is in effect a corollary to the issue which I have just been discussing. That evidence will be facts showing that the broad, all-inclusive language of the claim sued upon is so broad, that it includes all of the prior art, and that unless that language is restricted so that it refers to and describes solely and only this black bar 67 of the drawings of the patent it will be a void claim because it will describe the prior art. In other words, those proofs will be offered pursuant to the well-known rule that it is the duty of the Court to so construe the language of a claim as to preserve its validity even if to do so proves that the accused device does not come within the language of the claim. That rule of law is well illustrated in numbers of cases, and I shall hand Your Honor excerpts from some of them, merely referring to one of them now in order to indicate the rule of law pursuant to which our proofs on this issue will be offered. In the case of Burt against Ritchie, 251 Fed. 909, the rule is expressed in this manner:

“It is unnecessary to do more than refer to the proposition that the claims must be so interpreted as to give them a valid meaning, if possible, and that, if they would be rendered invalid by an interpretation so broad as to cover the defendant’s struc-

ture, it is to be presumed that the plaintiff in using the language which he put in the claims and which [507] was allowed by the Patent Office, was described that which can be held patentable; in other words, that the claims must be limited to the patentable invention, even though reference to the specifications, drawings, and of prior art is had, in order to learn the limitations referred to."

Briefer reference in a more recent case is that of *Black & Decker* against *Baltimore Truck Tire Service Corporation*, 40 Fed. (2d) at 910. The Circuit Court of Appeals for the Fourth Circuit there expressed the rule in this manner:

"While it is true that courts will not ordinarily interpret a positively recited generic expression as limited to the precise instrumentality disclosed by the patent, they will do even this where such narrow interpretation is necessary to distinguish the claim from the prior art and uphold the validity of the claim."

I shall hand your Honor excerpts of those cases and similar ones.

Now, the evidence offered pursuant to that rule of law will indicate this, that the element of the claim in suit which is described as automatic means for moving the clutch to neutral position upon movement of the load-lifting means to a predetermined extent in either direction will describe countless structures in the prior art. As will appear apparent from various evidence, including charts of

the prior art offered, it will be seen that that language and the combination of the claim as a whole is found in its entirety in these elevating and hauling trucks of the prior art. The only way in which that claim can in any manner be distinguished from the prior art is by restricting the language of that element E of the claim to mean a structure containing the load control stop characteristic of the Gerlinger machine. If that is done, then [508] the claim differs from all the prior art, because the only and single thing by which the Gerlinger construction differs from these prior structures is that one peculiarity of it whereby the upward movement of the load-lifting means is terminated by a mechanism engaged by the load. For instance, the evidence will include a prior patent granted to Nicholson, et al, many years ago. That patent, the evidence will show, contains the green frame structure, which is an elevator structure that can either stand on its own feet or it can be mounted on a truck for movement from place to place. The evidence will show that it contains load-lifting means moving within that frame and means for transmitting power from the source of power to the load-lifting means, including a power-controlling device which can be set in neutral or to cause the load to go up or to go down. It has manual means for effecting that operation, and if you take the broad language of the claim it has automatic means for moving the clutch to neutral position upon movement of the load-



lifting means a predetermined extent in either direction. The only way that that language can be differentiated from this prior patent, as well as others which we shall offer, is by interpreting that red language of the claim to mean something other than these red stops of the prior art, but a contrary thing, the black-colored stop of the patent in suit, which is purely a load control stop.

Another illustration of the evidence to be offered in this regard is the patent to Carr. We have a patent showing a structure of a very well-known instrument in industry, these little trucks used for raising and lowering loads of any kind of industrial products and transporting them from place to place. These very trucks as shown in this patent, the evidence will show, have been sold extensively throughout the country, and it contains the entire combination of the claim [509] in suit. The only way that you can distinguish the combination in that prior commercial and patented structure is by restricting the red language of the claim, automatic means for moving the clutch, and so forth, to the black load control stop of Gerlinger. If that language is not so restricted, then it describes this prior Carr truck completely and perfectly and it would be void, and according to the rule of law that we will be relying upon that construction must be given to the claim in order to save it.

Of course, Your Honor may conclude that perhaps if this claim does describe these prior struc-



tures in the way that we have shown that the claim is no doubt void. Perhaps it is. If you take the broad language of the claim as it reads we have what you might call an anticipation. However, the Courts are pretty liberal with patentees, but they say if there is no way of saving him from that drastic result of his effort to cover the entire art by claiming more than he has really contributed to the art that should be done, and in that case they urge upon the courts not to so construe claims. However, in this case it is not necessary to go far enough to hold the claim void. We are not going to present evidence intended solely to be anticipation of the claim in suit. We are presenting evidence to show lack of identity between the patented combination and that of the defendant, and once that issue is determined then it becomes unnecessary to go further and decide whether or not we have here a square anticipation of the claim.

However, dealing with the validity of the patent, we have one issue to which we will direct these proofs, and that is that the patent unavoidably and necessarily is void for lack of invention. It is true that you can differentiate the language of this claim from the prior art by restricting it to that peculiar stop of the patent in suit, but the evidence which we [510] will present will show that even limited and restricted to that this combination of the patent in suit does not differ in any inventive sense from the prior art. In other words, you take all the prior

art and see what is in it and you compare that with the disclosure of the patent in suit and ask yourself, Now, has this patentee, Gerlinger, progressed beyond this prior art by the use of any inventive skill? Our evidence will show that the answer can only be no, he did not progress beyond the prior art, he retrogressed, he resorted to a structure with this load control stop, which is not progress over the art, but an abandonment of the desirable practical stops which were free to be used by anyone. So as far as any mechanical skill in improving on the art, the disclosure of the patent does not show even the expected skill of the calling, and for that reason our proofs will be offered in support of the combination of the defendants that the patent is void for lack of invention.

We come next to the last issue to which the defense will be directed, and that is the defense of laches set up in the pleadings. The defendants will show that the combination which is accused to be an appropriation of something belonging to the plaintiff is one which one defendant to this cause has been using for over eight years, with the plaintiff's knowledge and without protest; that the combination which another of the defendants is using is one which it has been using for over twelve years, with the plaintiff's knowledge and without any protest on his part; and the contention of the defendants based upon those proofs will be that one who is so lax in asserting his rights is entitled to no con-

sideration at the hands of a court of equity and that his bill should be dismissed and both compensatory and injunctive relief be denied for that long, unreasonable and unexplained delay. [511]

With respect to the defendant Clark & Wilson Lumber Company it will become apparent from the evidence that as early as 1923 it acquired, became the owner of, a machine containing a combination in every respect a duplicate of the combination which is now charged to be an infringement and which it is now using. The evidence will show that Clark & Wilson's use of these machines containing that combination was specifically and directly called to Mr. Gerlinger's attention. He was asked, "Why don't you sue this Clark & Wilson Lumber Company for using this machine that seems to contain what your patent apparently covers?" and Mr. Gerlinger refused and has continued to refuse to sue ever since.

Now, in reliance upon that conduct the defendant Clark & Wilson Lumber Company continued its acquisition of machines containing that combination of parts. It did so to the extent of some fifty thousand dollars additional expenditures in machines containing that same combination, and our contention based upon that evidence will be that it is too late now for the plaintiff, after having permitted the defendant Clark & Wilson Lumber Company to spend all this money on machines containing that combination of parts, to come in and say



that they must stop using machines containing that combination and must account for their past use of them.

The same is true with the defendant Willamette-Hyster Company. The evidence will show that for more than eight years it and its predecessors have been making the combination here said to be an infringement. It has done so right under Gerlinger's nose. It will offer proofs to show that he had positive knowledge of what they were doing, he never made the slightest move to enforce any rights which he now at this belated day claims to be his. The evidence will indicate that in spite of his denials of knowledge the facts were directly to the contrary and were such that any rea- [512] sonable man should have known, if he did not know what was going on and he should have protested and made some assertion of rights prior to this belated date.

That, briefly, is an outline of the various groups of facts which we shall offer and the issues to which they will be directed, and with that introduction we will proceed with our evidence, and at this time I will hand to Mr. Geisler a copy of the various authorities which have been handed to the Court and which I have referred to.

Mr. Geisler: Thank you.

Mr. Fryer: May I have a few minutes, Your Honor, and we will be ready to proceed with our proof.

The Master: Yes, we will be at ease for a few minutes.



Mr. Fryer: I wish to offer at this time, and I understand that Mr. Geisler has no objection as to the authentication thereof, a photostatic copy of page 65 of the Timberman for October of 1926. It is now marked Defendant's Exhibit 15 for identification.

At this time we also offer in evidence Defendants' Exhibit 16 for identification, which is page 113 of the November, 1926 issue of The Timberman, that being a photostatic copy of that page.

The Master: That is 15?

Mr. Fryer: I am offering 16, also.

The Master: Well, have you the photostat of 15 as well?

Mr. Fryer: Yes, Your Honor.

The Master: 15, 16 and 17. I am wondering if we can't substitute those in place of the journals themselves?

Mr. Fryer: That is what I am doing right now. I am offering photostatic copies.

The Master: All right.

Mr. Fryer: Likewise, then, we offer a photostatic copy of page 216 of the November, 1926 Timberman, which will replace [513] Defendants' Exhibit 17 for identification. The last offer should be pages 216 and 217.

(The original documents heretofore marked for identification Respondents' Exhibits 15, 16 and 17, were thereupon withdrawn, and photostatic copies thereof substituted in lieu of said original documents and so marked.)

Mr. Fryer: We will call Mr. Hale, please.

## CLAUDE M. HALE

was thereupon produced as a witness in behalf of the respondents herein, and, having first been duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Fryer:

The Master: You may state your name and address.

A. Claude M. Hale, route 2, Box 307, Portland.

Q. (By Mr. Fryer) Will you be seated now, Mr. Hale. What is your occupation, Mr. Hale?

A. I am an auto mechanic for Clark & Wilson Lumber Company, repair their gas—all their gas engine equipment, including their lumber carriers.

Q. How long have you been doing that for Clark & Wilson Lumber Company?

A. Thirteen years.

Q. That is the Clark & Wilson Lumber Company who is a defendant in this case?

A. That is right.

Q. Thirteen years. That would be 1923, is that right?

A. Yes, sir. Well, it is over thirteen now. It was thirteen years last September to be exact.

Q. You were doing the same sort of work when you first went to work for Clark & Wilson as you are doing now, is that right? [514]

A. Well, that is right, only now I am working in the shop altogether. At that time I was doing part time driving and part time repairing their car-

(Testimony of Claude M. Hale.)

riers and trucks, their lumber carriers and trucks. Now I am in the shop altogether. Otherwise it is the same type.

Q. What make of lumber carriers did Clark & Wilson have when you first went to work for them?

A. They had two Gerlinger carriers when I went to work there. Three days later they purchased the Ross carriers. They had them ordered at that time. I was hired to go to work at that time, but I went to work three days before they arrived, so they had two Gerlingers and two Ross carriers.

Q. Did you have anything to do with the delivery of the two Ross carriers which you state Clark & Wilson got at that time?

A. Yes, I took them out of the box cars,—the two out of a box car.

Q. Did you have anything to do with putting them into commission?

A. Yes, I serviced them at that time.

Q. And when Clark & Wilson received these two carriers you speak of did they identify them by any numbers or in any other way?

A. Yes, they numbered one of them number 1 and one number 2.

Q. Did you make any record, as part of your work for Clark & Wilson, concerning the placing in service of the number 1 and number 2 Ross carriers?

A. Yes, I did.

Q. Have you got that record with you?

(Testimony of Claude M. Hale.)

A. Yes, I have it over there, here it is.

Q. Will you state whether or not the various entries in that book are made in your own handwriting.

A. They are.

Q. Are any of those entires in that book dated?

A. Yes.

Q. And will you state whether or not you placed the dates in the [515] book at or about the time when the events entered under those dates occurred.

A. Yes. Well, No. 1 Ross Carrier was purchased on September 15th, 1923; No. 2 September 15th, 1923.

Q. Will you point out to me the entries in the book which you have just referred to.

A. It is No. 1 Ross Carrier on September 15th, 1923, No. 2 Ross Carrier on September 15th, 1923 (indicating).

Mr. Fryer: Do you wish to look at this, Mr. Geisler?

Mr. Geisler: No, thanks.

Q. (By Mr. Fryer) I notice that under the heading No. 1 Carrier September 15th, 1923, there are a number of dates with entries under each, such as clutch, pilot bearing installed, and other items of that sort. Will you state whether or not there is any other page in this record book of yours besides the one headed No. 2 Carrier September 15th, 1923, which relates to that carrier.

The Witness: Will you repeat that again, please.



(Testimony of Claude M. Hale.)

Mr. Fryer: I will have the reporter read it to you.

(Last question read.)

A. We rebuilt that carrier—we took parts off of that machine; I won't say rebuilt it, either, but we took a lot of the parts, such as steering arms and drive shafts, steering assembly and wheels, driving heads, and parts of that nature, to build another machine. We wanted a wider carrier, one that was two feet wider and six inches higher, so we took that to the blacksmith shop and the blacksmith and I and an electric welder built another machine and we put that into service on November 26th, 1932, and we numbered that No. 11 Carrier.

Q. Have you an entry in your book indicating this work which you did on No. 1 carrier in November of '32?

The Master: Is that No. 1 or No. 2? [516]

Mr. Fryer: No. 2. Will you read the question, please?

(Last question read.)

A. No, I haven't. I haven't that entry. The only thing that I have is that we put in into service at that time and we numbered it No. 11. What we did I didn't keep any record of. We just made a bigger machine out of it and we put a larger motor in it. We used all the parts we could off the smaller machine, and I didn't write that into the book. I just

(Testimony of Claude M. Hale.)

numbered it. It would take too much time to write all that in, everything that I did.

Q. Have you any entry in your book about this No. 11 machine that you made up in that way?

A. I have a lot of parts, a lot of work that we have done on that machine since that, listed under our No. 11 carrier from the work that we done on No. 11 machine since that, maintenance work on it that I have listed in the book.

Q. Will you point out to me where your No. 11 carrier is listed in the book, please.

A. Right here (indicating).

Q. You have shown me a page with the words "Carrier No. 11, 11/26/32." Will you state whether or not that is the entry which you made at the time that this No. 2 carrier was reconstructed as you have described.

A. That is right. I reconstructed that machine. I entered it in the book, registered it as No. 11 carrier.

Mr. Geisler: Pardon me, I can't understand that. I thought you said nineteen twenty-six.

Mr. Fryer: Eleven twenty-six thirty-two.

Mr. Geisler: Eleven twenty-six thirty-two; I see.

Q. (By Mr. Fryer) The entries under the heading Carrier No. 11 in your book, are they also in your handwriting? A. They are.

Mr. Fryer: Have you any objection to photo-static copies of [517] those pages in lieu of the originals?

(Testimony of Claude M. Hale.)

Mr. Geisler: No.

Mr. Fryer: At this time we will offer photostatic copies of the pages of the witness' record book under the heading No. 2 Carrier September 15th, 1923, and No. 11 Carrier 11/26/32, and ask that those photostatic copies of those two pages be marked Defendants' Exhibit 53. We also offer in evidence a copy of the page of the witness' record book under the heading No. 1 Carrier, September 15th, 1923, and ask that that be marked Defendants' Exhibit 54.

The Master: Any objection?

Mr. Geisler: No, your Honor.

(The page headed No. 2 Carrier, September 15th, 1923, and the page headed No. 11 Carrier, 11/26/32, were thereupon received in evidence and marked Respondents' Exhibit 53, and the page headed No. 1 Carrier, September 15th, 1923, was received in evidence and marked Respondents' Exhibit 54, photostatic copies to be substituted.)

Q. (By Mr. Fryer) After your company, Clark & Wilson, got its No. 2 Ross Carrier, will you state whether or not it kept on using it right along up to the time that it was rebuilt?

A. They used it practically all the time until a few months before we rebuilt it, I can't state exactly how long, it is quite a while ago. But it got into a bad condition. The old Ross carrier frames

(Testimony of Claude M. Hale.)

were not very solid and they would spread out at the bottom and, therefore, you would drop loads, and business was pretty quiet at that time, so they didn't want to rebuild it, and they tied it up, took it out of service for a short time. Now I can't say for sure, but then they finally decided to build a wider machine; they needed more wide ones and less small ones, and so they decided to build a wide one. But outside of that it was in service all the time.

Q. After that No. 2 machine was made wider, as you say, did [518] Clark & Wilson continue to use it after that? A. Yes.

Q. It still has that machine?

A. They still have that machine.

Q. At the present time where is that machine which is now called No. 11? Is it not at your plant, is it?

A. Why, it is in the possession of the Willamette-Hyster Company.

Q. Have you recently inspected that No. 11 machine of yours in the Willamette-Hyster's possession? A. I have.

Q. Do you find it in the same condition as far as its parts are concerned as it was when you delivered it to defendant Willamette-Hyster Company?

A. Outside that it had been cleaned up some and painted, colored a little, but otherwise it was the same.



(Testimony of Claude M. Hale.)

Q. I show you a group of three photographs which are marked 38-A, 38-B and 38-C, and ask you to state whether or not you have compared those photographs with your No. 11 Ross carrier.

A. Yes.

Q. Will you state whether or not those photographs truly represent the construction of that Ross carrier as you saw it?           A. They do.

Mr. Fryer: We now offer in evidence the photographs heretofore marked for identification 38-A, 38-B and 38-C.

The Master: Any objection?

Mr. Geisler: No objection.

The Master: 38-A, B and C are received. What machines are those?

Mr. Fryer: Defendant Clark & Wilson's Ross Carrier.

The Master: They are both the same model, 1 and 2 the same model?

Mr. Fryer: This is No. 11 machine. It is the original No. 2 [519] that has been widened out.

The Master: All right.

(The three photographs of Clark & Wilson's Ross Carrier heretofore marked for identification Respondents' Exhibits 38-A, 38-B and 38-C were thereupon received in evidence.)

Q. (By Mr. Fryer) Will you tell us whether or not this No. 11 Ross carrier of your Company has any parts in it for automatically stopping the up-

(Testimony of Claude M. Hale.)

ward movement of the load lifting device when it reaches an upper limit?      A. It has, yes.

Q. Does it also have parts which automatically stop the downward movement of the load lifting means when it reaches a certain point?

A. Yes.

Q. Can you point out that automatic mechanism for doing that in the photographs Defendants' Exhibits 38-A, 38-B and 38-C? And, if so, merely refer to them by their color.

A. Do you want me to point them out?

Q. Just describe it if you find it there.

A. Well, in raising your load when those lifting hooks start up, they are the ones that lift the load; when they come up to a point about 14 inches, approximately 14 inches, this red lever—it pushes this red lever; the red lever continues through this rocker arm and over. It is in a vertical position when it pushes it and it continues through a rocker arm to a horizontal position, hitting the hoist clutch, and when it comes up to the top, or approximately fourteen inches, to that stop, it automatically kicks the hoist in neutral, therefore applying a brake on the clutch brake shaft—on the cross hoist shaft, which is yellow, this yellow cross hoist shaft. The brake is orange colored. So when this shaft automatically—when that will hit the lower end of [520] this red shaft it automatically pushes this hoist clutch in neutral, applying this brake, this orange colored brake.

(Testimony of Claude M. Hale.)

Q. Does this machine do that whether you have got a load in it or not?

A. Whether it is loaded or not, if it goes high enough to hit that stop it automatically does it. Ordinarily you can throw—you can kick it in neutral with your hand lever, which is this brown lever here; you can kick it in neutral and apply it the same as it would if it reached the top.

Q. Now when this No. 11 Ross carrier was originally delivered to your company and was called the Ross No. 2, did it have the same form of stop mechanism as you see on those photographs, Exhibits 38-A, 38-B and 38-C?

A. Everything was the same outside of the lower part of this shaft, this red shaft.

The Master: That is, appearing in exhibit what?

(By Mr. Fryer) What is the number of that exhibit?

A. 38-A. The lower part—we changed this frame; it is a much more solid frame, heavier constructed and we changed that a little. In place of having a hole drilled through the shafting with a bolt to hit this lever to automatically push that rod up, I welded an eye on the guide that that screw is connected to and therefore acting the same as it did before but the rod would slide in that guide and when it would come up to the height where it was on the old machine it would automatically kick it out. But otherwise the mechanism is all the same—

(Testimony of Claude M. Hale.)

all the hoist, and the hand control, and the brake, and all the automatic parts are the same, only the little part that we changed down below due to this type of frame.

Q. I show you a photograph with a mechanism colored red on it and ask you to state how that red mechanism on that photograph compares with the No. 2 Ross carrier stop when you first got it. [521]

A. This is the No. 2 Ross Carrier stop in this picture, and——

Q. That is the part colored in red?

A. The part colored in red is the stop that was on there originally, and this red bolt, also red, that goes through that hoist screw, and that screw travels up and down to the load—as the screw would come down this red bolt would hit this lever automatically kicking your hoist *clotch* in neutral and applying the hoist brake; then as it would go up the guide here, which is not colored, is a little white, just below this red arm, when it would come up it would automatically cut the load out. So we welded an eye on.

Q. On to what?

A. To this guide right here (indicating) that ordinarily hit this lever. We welded an eye on that and extended this red lever further down and let it run through that, slide through that, as it would raise and lower. When it would come down we had bolts on—nuts on this rod that were threaded, this



(Testimony of Claude M. Hale.)

red lever here, and whenever the load would go down the same distance it did before it would automatically stop. Then when it would come up, we had a bolt welded onto this rod and whenever this guide would slide up to that it would automatically kick it out. So it didn't change any of the mechanism, only this red rod, the lower part of this red rod.

Mr. Fryer: We now offer in evidence the photograph used by the witness in his answer and ask that it be marked Defendants' Exhibit 55.

The Master: Any objections?

Mr. Geisler: No, your Honor.

(The photograph of Ross Carrier stop colored red was thereupon received in evidence and marked Respondents' Exhibit 55.)

Q. (By Mr. Fryer) How many more Ross Carriers did your company get after these first two that you have told us about?

A. Let's see. I will have to number them. I don't remember offhand. I will tell you in a moment. They bought six more at [522] their Linnton plant and five more at their Prescott plant, which made eleven more altogether.

Q. That makes thirteen in all, with the first two?

A. Yes.

Q. Just roughly will you tell us about what those Ross carriers cost your company apiece?

(Testimony of Claude M. Hale.)

A. Well, I have been told that they were, although I have never seen any bills or any invoices on them I have been told that they were about forty-five hundred dollars for the small machines and about five thousand for the larger ones.

Q. Now did your company ever buy a Willamette-Hyster Lumber carrier?      A. Yes.

Q. About what time was the first Willamette-Hyster carrier purchased by your company?

A. The first one purchased was delivered there on March 18th, 1935.

Q. March 18th, 1935. Is that machine still in use at your plant?

A. It was up until about three or four weeks ago.

Q. What did you do with it then?

A. It was delivered to the Ross Carrier Company—to the Willamette-Hyster Company.

Q. Have you inspected it since it has been delivered to the Willamette-Hyster Company?

A. Yes.

Q. When you inspected it was it substantially the same in all its construction as when you were using it?      A. Yes.

Q. Has any number been placed on that Willamette-Hyster machine by Clark & Wilson?

A. Yes.

Q. What number is it?      A. No. 1. [523]

(Testimony of Claude M. Hale.)

Q. I show you two photographs and ask you to state whether or not you have compared those photographs with Clark & Wilson's No. 1 carrier?

A. Yes.

Q. And will you state whether or not those two photographs truly and correctly show the construction of Clark & Wilson's No. 1 carrier?

A. Yes, they do.

Mr. Fryer: We now offer in evidence the perspective view photograph identified by the witness and ask that it be marked Defendants' Exhibit 56-A. We also offer in evidence the partial side view photograph identified by the witness and ask that that be marked Defendants' Exhibit 56-B.

The Master: Any objection?

Mr. Geisler: No, your Honor.

The Master: They will be received and so marked.

(The perspective view photograph of Clark & Wilson's No. 1 carrier was thereupon received in evidence and marked Respondents' Exhibit 56-A, and the partial side view photograph of Clark & Wilson's No. 1 carrier was received in evidence and marked Respondents' Exhibit 56-B.)

Q. (By Mr. Fryer) Clark & Wilson's No. 1 carrier shown on the photographs you have just identified has upper and lower limit stops for the load lifting means?

(Testimony of Claude M. Hale.)

A. They have—no; their limit stop is in a horizontal position and the first mechanism on this other one is in a vertical position, but then thereafter—the first red lever is in a vertical position; thereafter it is in a horizontal position; but the one on the Willamette-Hyster's carrier is in a horizontal position.

Q. In your answer you were comparing Clark & Wilson's No. 11 Ross carrier with the Willamette carrier; is that right? [524]

A. Yes.

Q. The Willamette Carrier automatically stops the upward movement of the load lifting means and the downward movement of the load lifting means whether there is a load in the machine or not, does it?

A. Yes.

Q. And has it any brake in it like the brake of Clark & Wilson's Ross carrier?

A. It is a little different design, but it works the same way, because when the hoist is in neutral the brake is automatically applied, which is similar—is the same as on the other machine. When the limit stop—when the stop kicks it into neutral, why, therefore the brake applies. It is just a little different arrangement on the mechanism.

Mr. Fryer: You may cross examine.

Mr. Geisler: No cross examination.

(Witness excused) [525]

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Mr. Fryer: Yes. And at this time the defendants offer as one exhibit a copy of each of the prior



art references cited during the prosecution of the application for the Gerlinger patent in suit and ask that that be marked Defendants' Exhibit 57.

(The documents referred to were thereupon received in evidence and marked Respondents' Exhibit 57.)

Mr. Fryer: We will call Mr. Grab.

GUSTAV A. GRAB.

was thereupon produced as a witness in behalf of defendants herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Fryer:

The Master: State your name and address.

A. Gustav Adolph Grab, 3724 Northeast Senate Street, Portland, Oregon.

Q. What is your age, Mr. Grab?

A. Fifty years.

Q. And your occupation?

A. I am Manager of the Carrier Department at the Willamette-Hyster Company, in Portland, Oregon.

Q. And that Willamette-Hyster Company is one of the defendants in this case? A. Yes, it is.

Q. About the beginning of the year 1920 what was your occupation?

A. I was manager of a garage in Dallas, Oregon.

Q. Briefly, what were your duties as manager of the garage at that time and place?

(Testimony of Gustav A. Grab.)

A. I was in charge of the repair shop, of sales, and of all duties pertaining to general management of the business.

Q. Will you state whether or not prior to your engagement in [526] that manner at that time you had had any experience with mechanical matters?

A. I had experience with gas engines in general, automobiles, trucks, tractors, for at least fourteen years prior to that time.

Q. What was your next principal employment after your work as manager of the garage in Dallas, Oregon?

A. I became partner and manager in a tractor business in Dallas, Oregon.

Q. And how long were you occupied in that manner?           A. About one year.

Q. And thereafter what was your occupation?

A. I accepted employment with the Dallas Machine & Locomotive Works in Dallas, Oregon.

Q. The Dallas Machine & Locomotive Works you refer to is the plaintiff in this case?

A. Yes.

Q. About what date did you go to work for the plaintiff?           A. In May, 1921.

Q. And what, briefly, was the nature of your duties with the plaintiff?

A. At first, to start construction and complete the design of a Gerlinger carrier.

(Testimony of Gustav A. Grab.)

Q. When you refer to a Gerlinger carrier do you refer to a product which was then on the market?

A. No.

Q. Was the Dallas Machine & Locomotive Works manufacturing or selling a carrier when you went to work for it in May, 1921?

A. No, it was not.

Q. What relationship, if any, did Mr. Gerlinger have with the plaintiff at the time you went to work for the concern?

A. Mr. Gerlinger was president of the Dallas Machine & Locomotive Works. [527]

Q. For how long a time did you work with the plaintiff?

A. From May, 1921 to about January 1st, 1926.

Q. Now, throughout that period just tell us briefly the nature of the work which you did with the plaintiff corporation.

A. Within a short time after my employ I became Manager of the Carrier Department and I was in charge of manufacture, design and sales of the Gerlinger carrier.

Q. Approximately how long was it after you began working for the plaintiff before a Gerlinger carrier, as you call it, was sold?

A. About five or six months.

Q. Have you now a recollection of the construction and operation of that first Gerlinger carrier sold by the plaintiff at that time?

(Testimony of Gustav A. Grab.)

A. Yes, I have.

Mr. Fryer: May I see Exhibits 44-A, -B and -C, if the Court please.

Q. (By Mr. Fryer) I show you three views of a machine, being Defendants' Exhibits 44-A, -B and -C for identification, and ask you to state how the construction of the machine shown in those exhibits compares with your recollection of the first Gerlinger machine?

A. It is substantially the same.

Mr. Fryer: We now offer in evidence the photographs heretofore marked for identification as Defendants' Exhibits 44-A, 44-B and 44-C.

Mr. Geisler: Do you claim those to be complete in all details, Mr. Fryer?

Mr. Fryer: I think the testimony shows that the machine is substantially identical in its construction with the machine which the witness has said was first sold by the plaintiff corporation in—or first sold and it was the machine that was completed in 1921.

Mr. Geisler: We have no objection. [528]

The Master: They may be received.

(The three photographs heretofore marked for identification Respondents' Exhibits 44-A, 44-B and 44-C were thereupon received in evidence.)

Q. (By Mr. Fryer) Will you briefly state what part of the machine shown on the photographs Ex-



(Testimony of Gustav A. Grab.)

hibits 44-A, -B and -C is indicated by the green color?

A. The green-colored mechanism is the frame.

Q. And will you state briefly what part of the machine is indicated in purple on those photographs, Exhibits 44-A, -B and -C?

A. The purple mechanism is the load-lifting means in these exhibits.

Q. There is also some mechanism in the machine on the photographs Exhibits 44-A, -B and -C which is colored yellow. Will you tell us what that mechanism is, please?

A. The yellow mechanism is the power-transmission means to the load-lifting means.

Q. Briefly, what is included in that power-transmission means in that machine?

A. A reversible clutch and worm gearing and spur gearing, also some levers to connect up to the clutch mechanism.

Q. Now will you look at the photograph Exhibit 44-B and tell us what part of the machine is indicated by the orange-colored mechanism?

A. The orange-colored mechanism on Exhibit 44-B is the automatic brake.

Q. When does that brake function in the operation of the machine as a whole?

A. Whenever the power-transmission means is returned to neutral or inoperative position, either manually or automatically.

(Testimony of Gustav A. Grab.)

Q. Now will you tell us what the brown-colored mechanism on the photographs Exhibits 44-A, -B and -C is and what it does?

A. The brown mechanism is the hand lever for placing the power-transmission means into operative or inoperative position manually, or by hand.

[529]

Q. Will you state whether or not that brown hand lever performs any function during the automatic operation of the clutch?

A. No, it does not.

Q. Now, I notice some portion of the machine on the photographs 44-A, -B and -C indicated or identified by black lines. Will you state what that mechanism is, commencing first with the member lying just below the upper portion of the frame?

A. It is the load-controlled stop or trip.

Q. When you say a load-controlled stop just what do you mean?

A. It is a member which has to be actuated by a load of a certain size and type in the machine or on the load-lifting mechanism.

Q. And when the load having that certain size and type is in the machine and does actuate this load-controlled stop marked with black lines on Exhibit 44-B what does that do in the operation of the machine?

A. When this stop or trip is struck and lifted up by the proper load in the load-lifting mechanism

(Testimony of Gustav A. Grab.)

it automatically draws the power-transmission means to neutral or inoperative position.

Q. Now will you state whether or not that load-controlled trip in the Gerlinger machine of the Exhibits 44-A, -B and -C can perform any function in the operation of the machine if there is no load in the machine? A. No, it cannot.

Q. About how many machines having the construction and operation shown in the photographs Exhibits 44-A, -B and -C were constructed by the plaintiff, Dallas Machine & Locomotive Works, while you were employed by it? A. One.

Q. Do you recall whether or not the plaintiff, while you were employed by it, manufactured any other rack and pinion machines besides this first one you have described having the construction shown on Exhibits 44-A, -B and -C?

A. No, it did not.

Q. Did it make any kind *or* rack and pinion machines besides this [530] first one while you were employed by it? A. Yes, it did.

Q. About how many, as nearly as you can recall?

A. About nine or ten.

Q. How did those nine or ten machines differ from the one shown in the photographs Exhibits 44-A, -B and -C?

A. They had a lift-controlled stop in addition to the load-controlled stop.

(Testimony of Gustav A. Grab.)

Q. And how did that lift-controlled stop which was added to the machine you now refer to operate?

A. The lift-controlled stop would automatically return the power-transmission means to inoperative position whether a load was on the load-lifting means or not.

Q. And why did the plaintiff put that lift-controlled stop on those additional machines besides the load-controlled stop such as is shown on the photographs Exhibits 44-A, -B and -C?

A. The load-controlled stop proved very inefficient. We wrecked the lifting mechanism whenever no load was in the machine or if the load was of such shape and size so as to fail to strike the load-controlled stop before the load-lifting means reached its upper limits.

Q. After the plaintiff had completed the construction of this group of machines you have just described did it make any other lumber carriers while you were working for it?      A. Yes.

Q. What kind of lumber carriers were these?

A. We built hydraulic lift carriers.

Q. While the plaintiff was making hydraulic lift carriers did it also manufacture any other type, or did it manufacture hydraulics exclusively?

A. It manufactured hydraulic lift carriers exclusively.

Q. What kind of carriers was the plaintiff manufacturing and selling at the time that you terminated your connection with it? [531]



(Testimony of Gustav A. Grab.)

A. Hydraulic lift carriers.

Q. Will you state briefly, then, the period of time during which plaintiff was making hydraulic carriers exclusively while you were working for it?

A. From sometime in 1923 to the termination of my employ on January 1st, or about January 1st, 1926.

Q. Will you state whether or not any of those hydraulic carriers manufactured by the plaintiff during that period had an automatic brake such as the orange-colored mechanism shown on the photograph Defendants' Exhibit 44-B?

A. No, they did not.

Q. Will you state whether or not any of those hydraulic carriers contained a load-controlled stop such as the one you have described as contained in the machine shown on the photographs Exhibits 44-A, -B and -C?

A. No, they did not.

Q. Did it contain a lift-controlled stop such as you have described as being contained in the group of nine machines made by the plaintiff?

A. No, it did not.

Q. Have you been connected with the business of manufacturing and selling lumber carriers subsequent to the termination of your employment by the plaintiff?

A. Yes, I have.

Q. Has that been intermittently or continuously?

A. Continuously.

(Testimony of Gustav A. Grab.)

Q. Will you state, if you know, how long after the termination of your employment by the plaintiff that company continued to market hydraulic carriers exclusively?      A. About two years.

Q. Did any of those carriers to your knowledge contain any automatic brake or any automatic limit stops for the load-lifting device?

A. No, they did not. [532]

Q. While you were employed by the plaintiff was it or was it not part of your work to promote sales of the carrier which was being marketed by that company?      A. Yes, it was.

Q. Will you describe briefly just what you did in that regard?

A. I arranged for advertising, literature and personally called on the trade.

Q. In the course of that work will you state whether or not you made it any part of your business to become acquainted with all of the other carriers on the market?      A. Yes, I did.

Q. Speaking generally, now, with respect to your entire experience in the carrier business, will you describe briefly the nature and extent of that experience?

A. We principally called on lumbering operations, and principally in the West Coast territory. In making sales of lumber carriers we always had to contact the management, in most cases the president of the company, and as a whole the market was rather limited for lumber carriers.

(Testimony of Gustav A. Grab.)

Q. Would you say, then, that the list of prospective customers for carriers was a broad one or a narrow one?

A. It was definitely a narrow market.

Q. In your work for the plaintiff will you state whether or not you acquired any knowledge of any competing carriers?

A. Yes, I did.

Q. Will you name one of them, please?

A. The Ross carrier.

Q. Who was the manufacturer of that carrier?

A. The Ross Carrier Company, of Bentor Harbor, Michigan.

Q. Do you recall the first carrier made by that concern which you ever saw?

A. Yes, I do.

Q. Where did you see that carrier?

A. At the Inman-Poulsen Lumber Company.

[533]

Q. At about what date?

A. In the later part of 1921.

Q. Where was the Inman-Poulsen Company that you refer to located at that time?

A. In Portland, Oregon.

Q. At or about that time did you see any other Ross carriers in and around Portland, Oregon?

A. Yes, I did.

Q. Will you state where, if you please?

A. At the Jones Lumber Company and the Clark & Wilson Lumber Company in Portland, Oregon.

Q. Will you state whether or not the Clark &

(Testimony of Gustav A. Grab.)

Wilson Lumber Company you refer to is one of the defendants in this cause?       A. Yes, it is.

Q. Do you recall the approximate date upon which you saw this Ross carrier at the defendant Clark & Wilson's plant?

A. About the middle of 1923.

Q. Have you any present recollection of the construction and operation of the Ross carrier which you saw in possession of the defendant Clark & Wilson Lumber Company at that time?

A. Yes, I have.

Q. How do you happen to recall seeing a Ross carrier at the plant of the Clark & Wilson Lumber Company in 1923?

A. We had sold two hydraulic lift Gerlinger carriers to the Clark & Wilson Lumber Company prior to that time. They were giving a great deal of trouble and I made numerous trips to the Clark & Wilson Lumber Company to service those Gerlinger carriers, and I recall on one of those trips seeing the Ross carriers, very shortly after their arrival at the Clark & Wilson Lumber Company's plant.

Mr. Fryer: May the witness be shown photographs Defendants' Exhibits 38-A, -B, and -C, and ask you to state how the construction of the machine shown in those photographs compares with your recollection of the construction of the Ross carrier [534] which you saw at the plant of the defendant Clark & Wilson Lumber Company in 1923?



(Testimony of Gustav A. Grab.)

A. It is substantially the same.

Q. Do you see any respect in which the machine on those photographs Exhibits 38-A, -B and -C differs from the recollection which you have of the construction of the Ross carrier at Clark & Wilson's in 1923?

A. Yes, there is some difference in the frame structure and there is some difference in construction of a vertical red rod which is part of the stop mechanism.

Q. I now show you a photograph, Defendants' Exhibit 55, and ask you to state how the construction of the red stop mechanism shown on that photograph compares with your recollection of the stop mechanism contained in the Ross carrier seen by you at defendant Clark & Wilson's plant in 1923?

A. It is substantially the same.

Q. On the photographs 38-A, -B and -C a portion of the machine is colored green. Will you state what that part of the mechanism is, please?

A. The green mechanism is the frame.

Q. And will you tell us with respect to the other parts on the photographs Exhibits 38-A, -B and -C which have various colors applied to them what each colored structure is?

A. The purple mechanism is the load-lifting means, the yellow mechanism is the power-transmission means, the orange mechanism is the automatic brake, and the red mechanism is the automatic stop mechanism.

(Testimony of Gustav A. Grab.)

Q. And in your previous testimony you have referred to some stop mechanism as load-controlled and others as lift-controlled. Will you state whether or not this stop mechanism of the Ross carrier is a load-controlled or lift-controlled stop?

A. The red mechanism on the Ross carrier in these three exhibits is a lift-controlled stop.

Q. On the photograph before you, Defendants' Exhibit 38-C, I [535] call your attention to the two yellow circular structures lying between the yellow vertical pipes at each side of the machine and ask you to state what that yellow structure is?

A. That yellow structure on Exhibit 38-C is the reversing clutch mechanism.

Q. What type of clutch is that? Is it a mechanical jaw clutch or friction clutch?

A. It is a friction clutch.

Q. In that same photograph there is a red rod extending from the far side of the machine to that yellow reversing clutch which you have just described. Will you state what if anything movement of that red rod has to do with operation of the yellow reversing clutch?

A. This horizontal red rod showing towards the far side of the machine actuates the reversing clutch mechanism.

Q. And what does the actuation of the reversing clutch mechanism do in the operation of the machine as a whole?

(Testimony of Gustav A. Grab.)

A. This rod returns the clutch to neutral position when it is actuated by the lift controlled stop mechanism of which this red rod is a part.

Q. Now, will you look at the photograph Exhibit 38-B and the vertically disposed red rod appearing on that photograph and state what if anything that red mechanism there has to do with the operation of the red mechanism you have just described on the photograph 38-C?

A. This red vertical rod actuates the horizontal rod I just described through the linkage at its top end.

Q. And what if anything is contained in this Ross machine shown on Exhibit 38-B to actuate that vertically disposed red rod shown on that photograph?

A. When the load-lifting means moves in either direction the red stop lug which is fastened to the red lifting means and is shown just below the green horizontal channel member of the frame strikes—the red stops which are fastened to the vertical [536] rod at the lower end of the rod and on the rod just above the horizontal frame channel member whenever the load-lifting means reaches its upper or lower limits.

Q. And will you state whether or not that operation occurs irrespective of the presence of a load in the load-lifting means?      A. Yes, it does.

Q. Now, what relationship, if any, exists between this orange-colored mechanism on the photo-

(Testimony of Gustav A. Grab.)

graph 38-C and the red mechanism which you have just described?

A. The red lift-controlled stop mechanism automatically applies the orange brake mechanism whenever the load-lifting means reaches a predetermined position in either direction, and upon the reaching of this predetermined point it places the power-transmission means into neutral position.

Q. When you saw defendant Clark & Wilson's Ross carrier having the construction which you have just pointed out on the photographs Exhibits 38-A, -B and -C did you or did you not communicate any information concerning that Ross carrier to Mr. Gerlinger?

A. Yes, I immediately called Mr. Gerlinger's attention to this automatic stop control and automatic brake mechanism.

Q. What if anything did Mr. Gerlinger do when you told him that the defendant Clark & Wilson Lumber Company was using this Ross carrier having automatic upper and lower limit stops and brake?

A. Nothing, to my best knowledge.

Q. At about what date, as nearly as you can recall, did you call Mr. Gerlinger's attention to the defendant Clark & Wilson Lumber Company's Ross carrier having these automatic features?

A. Immediately after seeing the Ross carrier at the Clark & Wilson Lumber Company, after its



(Testimony of Gustav A. Grab.)

arrival at the Clark & Wilson plant, about the middle of 1923.

Q. Did you ever subsequently again call Mr. Gerlinger's at- [537] tention to defendant Clark & Wilson's Ross carrier having these automatic features which you have described?

A. Yes, I did repeatedly and on numerous occasions.

Q. Will you state whether or not the nature of your duties with respect to the carrier business of the plaintiff was such that if Mr. Gerlinger had taken any action with respect to this Ross carrier you would have known of that fact?

A. Yes, I would have known about it.

Q. Did you ever acquire any knowledge of any act done by Mr. Gerlinger with respect to defendant Clark & Wilson's Ross carrier which you told him about in 1923?

A. No, I did not.

Q. Will you state whether or not during your employment by the plaintiff you had any occasion to read any of the trade journals pertaining to the business of the plaintiff?

A. Yes, I did.

Q. Will you name some of those trade journals, please?

A. The Timberman and the West Coast Lumberman.

Q. The Timberman which you refer to is a monthly or yearly publication?

A. The Timberman is a monthly publication.

(Testimony of Gustav A. Grab.)

Q. And will you state whether or not during your employ by the plaintiff the monthly issues of *The Timberman* were available at the plant of the plaintiff?      A. Yes, they were.

Q. Will you state whether or not any of the products of the plaintiff were advertised in that publication?      A. Yes, they were.

Q. How frequently?      A. Very frequently.

Q. Did you have anything to do with the placing of advertisements of the products of the plaintiff in *The Timberman*?

A. Yes, to the extent that I was the primary factor in building up these advertisements. [538]

Q. Just what did you do in getting up the advertisements in that manner for *The Timberman*?

A. I arranged for photographs, arranged for the posing of machines and operators for the taking of the photographs, I wrote the stories or the descriptive matter appearing in the advertisements, and built the ads up in general before they were submitted to a regular advertising agency for final publication.

Q. State whether or not in that work you consulted with anyone connected with the plaintiff?

A. Yes, I did.

Q. With whom?

A. I freely consulted with Mr. Gerlinger.

Q. And in consulting with Mr. Gerlinger concerning the ads of the plaintiff which were being

(Testimony of Gustav A. Grab.)

prepared for The Timberman what use, if any, was made of any issues of The Timberman?

A. We carefully looked through the issues for competitive advertisements, or advertisements of competitive carriers.

Q. Did you find any advertisements of competing concerns in The Timbermans so examined by you and Mr. Gerlinger?      A. Yes, we did.

Q. Will you name some of them, please?

A. Advertisements by the Ross Carrier Company.

Q. That is the Ross Carrier Company of Benton Harbor, Michigan, that you have previously referred to?      A. Yes.

Q. And what did you see in the advertisements of that concern while you and Mr. Gerlinger were examining issues of The Timberman?

A. We saw general descriptions of the Ross carriers, and in one case the mention of automatic stops in the load-lifting mechanism.

Mr. Fryer: May I see Defendants' Exhibit 22, please?

The Master: 22 was that?

Mr. Fryer: 22.

Q. (By Mr. Fryer) I show you Defendants' Exhibit 22, being a [539] page from the December, 1925 issue of The Timberman, and ask you if you recognize in that exhibit any of the Ross Carrier Company advertisements referred to in your answer?

(Testimony of Gustav A. Grab.)

A. Yes, I recognize the ad on page 170.

Q. Will you point out what if anything in that advertisement is the matter which you referred to as indicating the presence of the automatic limit stops in the Ross carrier which you called to Mr. Gerlinger's attention?

A. The paragraph reading as follows: "Hoisting is positive and uniform at all four points of lift. Automatic cutouts are provided to prevent damage by unskilled operators. Load can be lifted a fraction of an inch or more and instantly stopped."

Q. After termination of your employment by the plaintiff what work, if any, did you undertake?

A. I accepted a position with the Willamette Iron & Steel Company of Portland, Oregon.

Q. On about what date?

A. On January 15, 1926.

Q. For how long a time did you work for the corporation known as Willamette Iron & Steel Company?

A. Until about February 15th, 1929.

Q. Generally, what was the character of the work which you did for that corporation throughout those years?

A. I was Manager of the Carrier Department in charge of design, construction, sales of lumber carriers, and in charge of general things pertaining to the management of the department.

Q. After February 15th, 1929 what did you do?



(Testimony of Gustav A. Grab.)

A. I continued in the same capacity with the Willamette-Ersted Company, the name of which was changed to the Willamette-Hyster Company about two years ago, to the present time.

Q. What relationship, if any, existed between the carrier business of Willamette Iron & Steel Company with which you were connected and the carrier business of the Willamette-Ersted Company? [540]

A. The carrier business of the Willamette-Ersted Company was a continuation of the carrier business of the Willamette Iron & Steel Company. The Willamette Iron & Steel Company sold its rights in the carrier business to the Willamette-Ersted Company about February 15, 1929.

Q. Will you state whether or not you had anything to do with the designing of a lumber carrier for the Willamette Iron & Steel Company after you accepted employment with it?

A. Yes, I did.

Q. What did you do in that regard?

A. I designed a carrier for the Willamette Iron & Steel Company in about—the beginning part of September, 1926.

Q. Have you any present recollection of the construction and operation of the carrier which you designed for the Willamette Iron & Steel Company commencing in September of 1926?

A. Yes, I have.

Q. May the witness be shown Exhibits 65-A and -B, please? Will you state how the construction of

(Testimony of Gustav A. Grab.)

the carrier shown on the photographs Exhibits 56-A and -B compares with your recollection of the carrier designed by you for Willamette Iron & Steel Company in 1926?

A. It is substantially the same.

Q. Will you look at Exhibit 52 and state whether or not you recognize the mechanism shown thereon as any part of the carrier shown on the photographs you have just referred to, Exhibits 56-A and 56-B.

A. Yes, I do.

Q. Will you state what you know about the preparation of this chart, Exhibit 52.

A. I arranged for taking the photograph of the mechanism shown in this chart.

Q. And will you state whether or not the photograph so taken was the photograph of actual parts taken out of one of the carriers having the construction of the one which you designed for Willa- [541] mette Iron & Steel?

A. Yes, it was.

Mr. Fryer: We now offer in evidence the chart heretofore marked for identification as Defendants' Exhibit 52.

The Master: Any objection?

Mr. Geisler: No.

The Master: It will be received.

(The chart heretofore marked for identification Respondents' Exhibit 52 was thereupon received in evidence.)

The Master: We will now take five minutes recess.

(Short recess.)

(Testimony of Gustav A. Grab.)

The Master: You may proceed.

Q. (By Mr. Fryer) I show you a photograph marked Defendants' Exhibit 43 for identification and ask you to state whether or not you recognize the machine shown on that photograph?

A. Yes, I do.

Q. Will you state whether or not it is a product manufactured by Willamette-Hyster Company, one of the defendants herein?

A. Yes, it is.

Q. Will you explain if you know how the machine shown on this photograph, Defendants' Exhibit 43 for identification, happens to have one wheel removed?

A. One wheel was removed to allow us to see at a glance the mechanism colored on this photograph.

Mr. Geisler: What is the exhibit?

The Witness: 43.

Q. (By Mr. Fryer) Is there anything else in the machine shown in the photograph, Exhibit 43 for identification, which is different from the normal condition of the machine as used in business?

A. Yes. Several counterweights at the extreme left side of the photograph were removed and the cover covering a reversing clutch mechanism was lifted up also to further facilitate the view of [542] the colored mechanism.

Q. Except for these arrangements in the machine made for the purpose of taking this photograph, will you state whether or not the photograph,

(Testimony of Gustav A. Grab.)

Exhibit 43, is a true and correct representation of the construction and arrangement of parts of the Willamette-Hyster machine shown on that photograph?      A. Yes, it is.

Mr. Fryer: We now offer in evidence the photograph heretofore marked for identification and ask that it be marked Defendants' Exhibit 43.

Mr. Geisler: No objection.

(The photograph heretofore marked for identification Respondents' Exhibit 43 was there-upon received in evidence.)

Q. (By Mr. Fryer) Have you any enlargement of the photograph, Defendants' Exhibit 43, which will show the parts of the machine more clearly?

A. Yes, I have.

Q. Will you state whether or not the enlargement which is now placed before you is a true and correct reproduction of the photograph, Exhibit 43, which you have just identified?

A. Yes, it is.

Q. And will you state whether or not the colors which appear on this enlargement are placed in the same manner on the enlargement as they appear on the small photograph, Exhibit 43?

A. Yes, they are.

Mr. Fryer: We now offer in evidence the enlarged photograph of the Defendants' Exhibit 43 and ask that it be marked Defendants' Exhibit 58.

Mr. Geisler: No objection.



(Testimony of Gustav A. Grab.)

The Master: It becomes Respondent's Exhibit 58.

(The enlarged photograph of Respondents' Exhibit 43 heretofore marked for identification Respondents' Exhibit 58 was thereupon received in evidence.) [543]

Q. (By Mr. Fryer) When did the defendant Willamette-Hyster Company first manufacture a carrier as shown on the photograph, Defendants' Exhibit 58? A. Early in 1935.

Q. What, if anything, did you have to do with the designing and development of that Willamette-Hyster carrier shown on the photograph, Defendants' Exhibit 58?

The Master: Pardon me. Is that '35 or '25. I didn't get it.

Mr. Fryer: Oh, '35 is the year.

The Witness: '35.

Mr. Fryer: Will you read the question, Mr. Reporter.

(Last question read.)

A. I designed and developed the machine shown in this exhibit.

Q. Will you state what parts, if any, of the mechanism shown on Exhibit 58 are interchangeable with mechanism contained in Defendant Clark & Wilson's Willamette carrier shown on the photographs, Exhibits 56-A and 56-B?

Mr. Geisler: I object to that question, your Honor. I don't see its materiality. This machine was built in 1935. We admit it is not an infringe-

(Testimony of Gustav A. Grab.)

ment, or intended to be an infringement, of the plaintiff's patent. Of course, if your Honor would like to know its construction we have no objection to that, but we can't see any materiality.

The Master: What do you claim for it?

Mr. Fryer: We have this very definite purpose in this item of proof, your Honor: The machine shown on the photograph, Exhibit 58, is admittedly, and of record, something outside of the patent in suit. In other words, that is in the same position as a prior art patent. It is a construction which is admittedly not within the monopoly of the patent. Now we are going to show by this proof that the accused structure in the defendant's machines is identical with this structure which is said to be outside of the patent and thereby prove that the accused structure does not infringe any more than this structure, which is admittedly outside [544] of the patent, infringes. In other words, it is part of our proof of lack of an infringement. In other words, we are going to have two items of proof of this character in this case. We are going to show first the accused combination is identical with prior art combinations to show there is no infringement, because obviously the prior art cannot infringe. If we are identical with the prior art combination we do not infringe. Secondly, if our accused combination is identical with any other combination which for some other reason does not infringe, again, that is refutation of the charges of infringement. So

(Testimony of Gustav A. Grab.)

by proving the identity of the combination with the combination found in this machine which, as of record, does not infringe, we shall also prove non-infringement, and this evidence is material and relevant to that issue.

Mr. Geisler: When counsel speaks of prior art, of course, your Honor, we are thinking only of the art which was prior to the patent, not an invention following the date of the patent, and so on. I can't connect the two. We admit again that construction there shown does not infringe upon our patent, and at any future time if there is a machine of similar nature as this exhibit, Defendants' Exhibit 58, why, it will be again for your Honor to pass upon it; and I may say in advance now any similar construction we shall not claim to be an infringement upon it.

Mr. Fryer: That is not my point, if your Honor please. I don't know if I make myself clear, but we don't contend that this carrier shown on Exhibit 58 is a machine which was built prior to the making of the Gerlinger patent. We do have this very definite state of facts, though: The record conclusively shows that the machine shown on Exhibit 58 does not contain any combination which infringes the patent in suit. In other words, we can take it that whatever is in that machine is outside of the patent. Now we are going to show that in the machine which is accused to be an infringement the only structure which has any relationship to this suit is a structure

(Testimony of Gustav A. Grab.)

identical [545] in construction, mode of operation and function with the structure contained in this Willamette carrier, which is admittedly outside of the patent. That is a very direct way of proving the lack of identity then between the combination of the patent in suit and the accused combination. That is the sole purpose of using this machine. We are not contending that machine itself was built at this anterior date.

Mr. Geisler: I can't quite follow counsel, but for the purpose of cutting it short I will say to your Honor, accept it subject to the objection and pass on it later.

The Master: Well, in view of the statement of of counsel the objection will be overruled and the testimony will be received. At some subsequent time in the case I shall be glad to have counsel for the complainant reveal to the Master his theory on why this particular construction does not infringe or does not disclose the principles or the elements of the patent in suit. I don't want to take the time now unless counsel desires to do so now. I don't think it is necessary at the present time. I shall be glad to have you discuss that, however, later on. You may answer the question. Do you remember what it is?

The Witness: May I have the question read, your Honor?

The Master: Yes.

(Last question read.)



(Testimony of Gustav A. Grab.)

Q. The reverse clutch mechanism shown in yellow at the extreme left of chart, Exhibit No. 58, with the orange brake mechanism is a part of the reversing clutch mechanism, is interchangeable with the reversing clutch mechanism and the orange brake which is a part of the reversing clutch mechanism shown at the extreme right of Defendants' Exhibit No. 56-B.

Q. (By Mr. Fryer) When you say that the parts on those exhibits you have been referring to are interchangeable, will you state whether or not you mean that you could take the part you refer to out of one machine and place it in the other machine and have it function there just as well as the part originally [546] in that machine?

A. Yes. The parts are exactly the same and interchangeable.

Q. Will you state how the mechanism colored in red on the chart, Exhibit 58, and the red mechanism on the photographs, Exhibits 56-A and 56-B, compare in function?

A. The parts in red on those two exhibits function substantially the same.

Q. And in their respective machines what do these red mechanisms do?

A. They are automatic lift control stops in both machines.

Q. When you say lift control stops do you mean stops which function automatically irrespective of the presence of a load in the machine?

(Testimony of Gustav A. Grab.)

A. Yes.

Q. Will you briefly explain what the purple mechanism is on the chart, Exhibit 58, and how it works in that machine?

A. The purple mechanism at the extreme right of the chart in Exhibit 58 is the load lifting mechanism. It moves up and down in the green vertical guides shown.

Q. What use is made of those two horizontal extending members colored purple at the extreme right of the chart, Exhibit 58?

A. Those purple members at the very extreme end of the chart are the load arms or a form of load platform of the load lifting mechanism.

Q. How are they used in practice?

A. These load arms or platforms are pushed under a load. The load for carriers is ordinarily placed on stands which are some distance above the ground so that the shoes or hooks or platforms may be pushed or drawn under the load.

Q. I show you Defendants' Exhibit 42 for identification and ask you to state whether or not the machine and the load shown in that photograph illustrates the operation which you have just described with the machine shown on Exhibit 58.

A. Yes.

Q. Will you state what you know about the photograph, Defendants' [547] Exhibit 42, in so far as the taking of it is concerned?

(Testimony of Gustav A. Grab.)

A. I arranged for the taking of this photograph.

Q. Were you present when it was taken?

A. Yes.

Q. Is it a true and correct representation of the machine and as it was when the photograph was taken?

A. Yes, it is.

Mr. Fryer: We now offer in evidence the photograph heretofore marked for identification and ask that it be received as Defendants' Exhibit 42.

Mr. Geisler: It is another type of the load lifting device?

Mr. Fryer: It is the same machine, Mr. Geisler.

Mr. Geisler: The same machine? No objection.

The Master: It will be received.

(The photograph hertofore marked for identification Respondents' Exhibit 42 was thereupon received in evidence.)

Q. (By Mr. Fryer) Will you state whether or not the machine shown on the photograph you have just identified, Exhibit 42, is the same machine as the one shown on the chart, Exhibit 58?

A. Yes, it is.

Q. And will you state whether or not the load of lumber as carried by the machine shown in the photograph, Exhibit 42, represents the usual and customary operation of that product of the defendant Willamette-Hyster Company?

A. Yes. This machine was specifically designed for handling lumber along with other materials.

(Testimony of Gustav A. Grab.)

Q. Will you state whether or not the defendant Willamette-Hyster Company advertises to the trade this machine shown on the photograph, Exhibit 42, as one to be used for handling lumber?

A. Yes, we do.

Q. I ask you to look at Defendants' Exhibit 41 for identification and ask you to state whether that is one of the circulars used by the defendant Willamette-Hyster Company in making the [548] type of advertisement you have just referred to.

A. Yes, it is.

Mr. Fryer: We now offer in evidence the circular heretofore marked for identification and ask that it be received as Defendants' Exhibit 41.

Mr. Geisler: No objection.

The Master: It will be received.

(The circular of Willamette-Hyster Company heretofore marked for identification Respondents' Exhibit 41 was thereupon received in evidence.)

Q. (By Mr. Fryer.) What is it in the machine shown on the chart, Exhibit 58, which elevates the purple load lifting device in the manner described by you a moment ago?

A. The power transmission means shown in yellow.

Q. And will you just briefly describe what is comprised in that yellow mechanism which trans-



(Testimony of Gustav A. Grab.)

mits power to the load lifting device?

A. A reversing clutch, which receives its power from a gas engine. The power is transmitted through worm gearing on the far side of the machine and can't be seen, through a cable to the load lifting means. The cable winds on cable drums which are part of the worm gearing mechanism.

Q. Is there any mechanism in that machine on Exhibit 58 for operating the yellow reversing clutch by hand?      A. Yes.

Q. Will you point it out, please?

A. The top of the brown hand lever is shown just under the steering wheel and just above the gasoline tank.

Q. What mechanism does that brown hand lever operate to control the clutch in the manner you described a while ago?

A. This hand lever operates the horizontal yellow link or shaft through a cross shaft on which the hand lever is fastened.

Q. I notice that that cross shaft which you have just referred to has a depending member on the end which we see in the photo- [549] graph, Exhibit 58, and with the red mechanism of the photograph apparently connected to the lever at that point. Will you explain what that red linkage connected to that end of the shaft at that point has to do in the operation of the clutch?

A. The red mechanism is the automatic stop mechanism for returning the clutch to neutral posi-

(Testimony of Gustav A. Grab.)

tion automatically when the load lifting means reaches a predetermined position in either direction.

Q. Just briefly will you tell us how that red mechanism works in doing that?

A. A stop on the load lifting mechanism strikes a corresponding stop on the red linkage at the upper limit of the travel of the load lifting means and, through the linkage, draws the clutch to neutral position.

Q. And it draws the clutch to neutral position through what member shown on Exhibit 58?

A. Through the horizontal yellow member to which the horizontal red member is attached at about the center of the chart.

Q. I notice that this horizontal yellow member or rod which you have referred to has orange colored mechanism attached to it near the left hand end of the chart, Exhibit 58. Will you explain what connection, if any, there is between that yellow clutch operating shaft and that orange colored mechanism?

A. The orange colored mechanism is the automatic brake mechanism and is attached to the horizontal yellow shaft at this point and is actuated by the yellow shaft. The point I refer to is the end of the yellow colored structure towards the right side of the chart.

Q. Now just in general, will you state how the operation of this machine shown on Exhibit 58,

(Testimony of Gustav A. Grab.)

which you have just described, compares with the operation of the corresponding parts in the machine shown on the photographs, Defendants' Exhibits 56-A and 56-B? Are they substantially the same or substantially different?

A. It is substantially the same. [550]

Q. Will you tell us how Clark & Wilson's Willamette carrier, shown on the photographs, Defendants' Exhibits 56-A and 56-B, compares in construction and operation with the carrier which you designed for Willamette Iron & Steel Company in 1926?

A. It is substantially the same.

Q. And will you state whether or not Willamette Iron & Steel Company marketed that carrier which you designed for it in 1926?

A. Yes, it did.

Q. How soon after your design of it in 1926 did it do so?

A. We sold the first machine at the end of 1926 and delivered it early in 1927.

Q. And will you state whether or not manufacture and sale of machines having that construction and operation was continuously carried on after that date by Willamette Iron & Steel and its successors?

A. Yes, it was.

Q. Will you also state whether or not Willamette Iron & Steel in any way advertised the machine so designed by you for it in 1926?

A. Yes, it did.

(Testimony of Gustav A. Grab.)

Q. In what way?

A. We placed advertisements in trade publications at regular intervals. We distributed literature and we advertised the machine in direct contact selling.

Q. Will you state whether or not in all this advertising and publicizing of the machine so designed by you in 1926 the various features of the construction of that machine were disclosed and described?

A. Yes, they were.

Q. How much has such advertising and publicizing of that machine and construction been carried on by the Willamette Iron & Steel and its successors in business?

A. Ever since the beginning of 1927.

Q. And just roughly can you tell us approximately how many carriers having the construction and operation of the one designed by you [551] for Willamette Iron & Steel in 1926 have been manufactured and sold since that date?

A. Over three hundred.

Q. I show you Plaintiff's Exhibit 2, a copy of the Gerlinger patent in suit, and ask you to state whether or not you have heretofore read that patent; and, if you have a copy with you, you might refer to it there.

A. Yes, I have.

Q. Do you understand the construction and operation of the machine shown in the drawings of that patent, Exhibit 2?

A. Yes, I do.



(Testimony of Gustav A. Grab.)

Mr. Fryer: Now, if your Honor please, I think that the evidence from here on will be more readily understood and appreciated if we be accorded an opportunity to demonstrate to the Court various machines containing the structures about which we are going to talk. We have a room arranged with the machines in it where they can be operated, and some questions can be addressed to the witness at that point, so that there will be a record of what we say there; and if that procedure can be followed I think it will expedite the evidence as a whole and facilitate an understanding of that evidence. For that reason I would suggest, then, that we might adjourn at this time and convene again a half hour sooner at this show room that we have arranged and continue the hearing in that manner, or we can provide transportation, if your Honor cares to.

The Master: I am perfectly willing to go out there. I think, however, that I understand how the mechanisms work. Upon the question of any difficulties in operation perhaps I haven't been advised by any testimony.

Mr. Fryer: Some of the operations which we purpose to perform on the machines will be reflected in the testimony of the witness and in that way will become a matter of record.

The Master: I think when we adjourn we will adjourn until two [552] o'clock, due to the fact Mr. Geisler has made an appointment with which an earlier meeting would conflict. But I wonder if there are not some matters we can take up now

(Testimony of Gustav A. Grab.)

and use up this time, without destroying the continuity of your case.

(The photostatic enlargement of the drawings of patent in suit heretofore marked for identification Respondents' Exhibit 25 was thereupon received in evidence.)

Mr. Fryer: And Exhibits 39 and 40, which were marked for identification at the request of the defendant, we can relieve your Honor of the custody of. We will not offer those. We will take those back and take those two exhibits out of the record.

The Master: 39 and 40 are withdrawn.

The Master: We will adjourn then until two o'clock.

(Whereupon, at 11:41 o'clock A. M., November 30th, 1936, a recess was taken until 2:00 o'clock P. M., to reconvene at Twenty-eight and Sandy Road.)

### Afternoon Session.

2:00 P. M.

The Master: Proceed.

G. A. GRAB

thereupon resumed the stand as a witness in behalf of the defendant herein and further testified as follows:

### Direct Examination

By Mr. Fryer (Continued):

Q. Do you find here the machine of the Gerlinger patent previously described in your testi-

(Testimony of Gustav A. Grab.)

mony and shown in the photographs, Defendants' Exhibits 44-A, 44-B and 44-C?

A. Yes, I do.

Q. That is the machine before you with the sign on it, "Elevator of Gerlinger Patent"?

A. Yes, it is. [553]

Q. I notice parts of that machine have been painted different colors. Will you state what correspondence, if any, there is between the colors on that machine and the colors on the photographs, Defendants' Exhibits 44-A, 44-B and 44-C?

A. The colors on the machine correspond with corresponding parts on the photographs colored the same way.

Q. Will you now operate the machine of the Gerlinger patent with a load of lumber in it in a manner to illustrate how the black bar in the machine corresponding to the part 67 of the Gerlinger patent functions to move the clutch to neutral and stop the load lifting means when the load strikes that black bar?

A. Yes. (Witness operates machine.) I have done so.

Q. Mr. Fryer: I will state, your Honor, if there are any of these operations you care to have repeated we will repeat them as we go along, if you will indicate the ones you want repeated.

The Master: There is one question I would like to ask. I note on the downward movement of the load there is an automatic stoppage but in order to

(Testimony of Gustav A. Grab.)

disengage the shoes an additional operation was indicated. Is that entirely manual?

A. No, your Honor. The downward stopping is entirely automatic.

The Master: Well, after the automatic stopping had occurred there seemed to be an additional movement to disengage the shoes from the load. Was that automatic or manual?

A. Automatic. The machine is old and I am afraid to run it too fast or hard, because I am afraid I might break something on it. I can demonstrate that again to your Honor, if you would like to have me.

The Master: Well, I don't know that that is necessary. But the movement that you made was not due to anything except the age of the machine?

A. That is right, your Honor.

Q. (By Mr. Fryer) Now will you arrange the load of lumber in the machine of the Gerlinger patent in a manner to demonstrate whether it can strike the frame of the machine without engaging the black [554] bar corresponding to the bar 67 of the Gerlinger patent? A. Yes.

Q. Just a minute, Mr. Grab. Have you arranged the lumber in that manner? A. Yes.

Q. Will you now elevate the load in the machine until the upper side of the load strikes the under side of the frame of the machine, so that we may observe whether or not the black bar corresponding to 67 of the patent will function in that operation?



(Testimony of Gustav A. Grab.)

A. Yes. (Witness operates machine.) The load is a little too high. (The witness here moved forward the three upper tiers of lumber in the machine.)

The Master: Is it now in neutral?

A. Yes. (Witness operates machine.)

Q. (By Mr. Fryer) In that last operation did anything in the machine automatically move the clutch to neutral position, or were you required to manually move the clutch to neutral position in order to stop the upward movement of the load lifting means?

A. I was obliged to manually move the mechanism to neutral position.

Q. And why was that?

A. Because the load did not strike the automatic load control stop.

Q. That is, it did not strike the stop prior to striking the frame?

A. It did not.

Q. About how great a difference is there between the top of the load which struck the frame and the portion of the load which now underlies but does not touch the black bar corresponding to bar 67 of the Gerlinger patent?

A. About five inches.

Q. (By Mr. Fryer) Do you find here defendant Clark & Wilson's Ross carrier shown in the photographs, Defendants' Exhibits 38-A, [555] 38-B and 38-C?

A. Yes, I do.

(Testimony of Gustav A. Grab.)

Q. Will you state how the coloring which appears on the various parts of that machine corresponds with the colors on the photographs, Defendants' Exhibits 38-A, 38-B and 38-C?

A. It is the same.

Q. Will you now start the load lifting means of the Clark & Wilson's Ross carrier moving upwardly without any load on it and show the Court what will happen without any further manipulation of the machine?

A. Yes. (Witness operates machine.) I have done so.

Q. I notice that in the operation just performed on the defendant Clark & Wilson's Ross machine the load lifting means reached an upper limit and stopped at that point without any load in the machine. Will you describe briefly how that operation compares with the operations performed by you on the machine of the Gerlinger patent?

A. In the Gerlinger machine it was necessary for a load to strike a load controlling stop to draw the power transmission mechanism to neutral position. In this machine the red stop mechanism drew the load control—the power transmission means to neutral position without a load in it when the load lifting means reached its upper limit.

Q. When you say "this machine", you refer to Clark & Wilson's Ross carrier?

A. Yes, the Clark & Wilson Ross carrier.

(Testimony of Gustav A. Grab.)

Q. Now do you find here the defendant Clark & Wilson's Willamette carrier, shown in the photographs Defendants' Exhibits 56-A and 56-B?

A. Yes.

Q. What relationship is there between the coloring appearing on this machine and the coloring appearing on those photographs, Exhibits 56-A and 56-B?

A. Corresponding parts are colored the same in the machine and in [556] the exhibits referred to.

Q. Now will you operate the defendant Clark & Wilson's Willamette-Hyster carrier without a load in it and start the load lifting means up and let the Court see what will happen without any further manipulation of the machine?

A. Yes. (Witness operates machine.) I have done so.

Q. In that operation was it necessary to manipulate any part of the machine in order to terminate movement of the load lifting means in either direction?

A. No, it was not.

Q. And that operation was made without any load in the machine?

A. Yes, it was.

Q. Do you find here a machine corresponding to the Willamette-Hyster's machine shown on the photographs, Exhibits 42 and 43?

A. Yes, I do.

Q. Will you state how the coloring on that machine compares with the coloring appearing on the photographs 42 and 43?

(Testimony of Gustav A. Grab.)

A. The coloring is the same on corresponding parts of the machine as on the photographs.

Q. Can you operate this machine, such as shown in the photographs, Exhibits 42 and 43, with the load of lumber on the load lifting means and demonstrate what will happen if the load lifting means are started upwardly and no further manipulation of the machine is had?

A. Yes. (Witness operates machine.) I have done so.

Q. Will you state whether or not the presence of the load in the machine of the photographs, Exhibits 42 and 43, had anything to do with the automatic termination of upward movement of the load lifting means? A. It did not.

Q. In other words, in the operation of the machine shown in Exhibits 42 and 43 did you perform any manual operation to terminate upward movement of the travel of the load lifting means? [557]

A. I did not.

Q. Did you perform any manual operation to terminate downward movement of the load lifting means? A. No, I did not.

The Master: Would you mind operating this once again?

The Witness: Yes. (Witness operates machine again.) I have done so.

Q. (By Mr. Fryer) Will you point out in the defendant Clark & Wilson's Willamette carrier where there is located the mechanism which corre-



(Testimony of Gustav A. Grab.)

sponds to the orange colored mechanism in the small machine shown in photographs, Exhibits 42 and 43?

A. At the front end or the near end of the machine you can see it from underneath.

Mr. Fryer: Now, if the Court, please, I will suggest if opposing counsel have any questions that they care to ask with respect to the machines we have no objection to their doing so at this time. If not, why, then we are through with everything that the defendant wishes to present here at this time.

Mr. Geisler: No. The questions we can ask in the cross examination in the regular course.

The Master: Very well, gentlemen. If there is nothing more we will reconvene at the court room.

(Thereupon at 2:32 o'clock P. M. proceedings were adjourned to be resumed at the court room, and at 2:48 o'clock P. M. proceedings were reconvened at the court room, as follows:)

### G. A. GRAB

thereupon resumed the stand as a witness in behalf of the defendants herein and further testified as follows:

#### Direct Examination

By Mr. Fryer (Continued):

The Master: You may proceed.

Mr. Fryer: We now offer a copy of the prior patent to Dingee, No. 414380, and ask that that be

(Testimony of Gustav A. Grab.)

marked Defendants' Exhibit 59; and we will hand the judge a copy for his own use. [558]

The Master: Any objection?

Mr. Geisler: I don't think that was cited as an anticipation patent. It gives the prior art; is that it?

Mr. Fryer: It is not pleaded in the answer as an anticipation.

Mr. Gleisler: And you won't rely on it for that purpose, either?

Mr. Fryer: No; we are relying on it as showing the state of the prior art.

Mr. Geisler: Only.

The Master: It will be received for that purpose. It becomes Respondents' Exhibit 59.

(The patent to Dingee, No. 414380, was thereupon received in evidence and marked Respondents' Exhibit 59.)

Q. (By Mr. Fryer) Have you studied, and do you understand, the machine shown in the drawings and described in the specification of the Dingee patent, Defendants' Exhibit 59? A. Yes.

Q. I show you a chart and ask you to state whether you have compared the drawings appearing on that chart with the drawings on the Dingee patent, Defendants' Exhibit 59. A. I have.

Q. And will you state whether or not Figures 1 and 2 appearing on that chart before you are true and correct copies of Figures 1 and 2 on the drawings of the Dingee patent, Defendants' Exhibit 59?

(Testimony of Gustav A. Grab.)

A. Yes.

Q. Except for the coloring which appears on the chart?

A. Yes, they are.

Q. I call your attention to the language appearing at the right hand side of that chart before you and ask you to state whether you compared that language with any of the documents here in evidence?

A. Yes, I have. [559]

Q. Will you state whether or not it is a copy of anything found in any of those documents; and, if so, what?

A. It is a true copy of claim 4 of the plaintiff's patent, Exhibit No. 2.

Mr. Fryer: We now offer the chart identified by the witness and ask that it be marked Defendants' Exhibit 60.

The Master: Is there any objection?

Mr. Geisler: Well, your Honor, that includes a statement that the plaintiff's claim is connected with that chart. The plaintiff's claim No. 4 has nothing to do with that patent whatsoever. So I object to it being included in that exhibit.

Mr. Fryer: Of course your Honor understands the offer, not professing to say that language is found in the Dingee patent but it is included in this chart for convenience or reference merely, and it is a true copy of what it purports to be.

Mr. Geisler: I ask that the statement of the claim in connection with that patent be excluded, because it simply befogs the matter. It is not a description of that patent whatsoever, your honor.

(Testimony of Gustav A. Grab.)

The Master: Not a description of your patent or that patent?

Mr. Gleisler: It is claim 4 of our patent, which he associates with this prior patent, and it is not described in any of the prior patents, except the mere connection from the witness as he is trying to do.

The Master: Well, with the statement of counsel that the legend on the right hand side of this exhibit, starting with the words "A lumber carrier comprising", and including means a to f, inclusive, are not a part of the description or claims in the Dingee patent.

Mr. Geisler: That is correct, your Honor.

The Master: It will be received.

Mr. Geisler: That is correct, your Honor.

The Master: And it will become Respondents' Exhibit 60. [560]

(The chart showing drawings in re Dingee patent was thereupon received in evidence and marked Respondents' Exhibit 60.)

Mr. Fryer: We now hand your Honor a copy of Exhibit 60 for your own use.

Q. Will you state briefly what kind of mechanism is depicted by the drawings on the chart, Exhibit 60?      A. It is an elevator.

Q. In that elevator construction what is the green mechanism shown on the chart?

A. The green mechanism is the frame.



(Testimony of Gustav A. Grab.)

Q. And what is that purple colored arrangement shown on the chart, Exhibit 60?

A. The purple mechanism is the load lifting means.

Q. Now there is some mechanism on the chart which is colored yellow. Will you state what function in the machine that yellow mechanism performs?

A. The yellow mechanism is the power transmission means from a source of power to the load lifting means.

Q. In this Dingee construction shown on the chart, Exhibit 60, what is it that supplies the power for operating the load lifting means?

A. No source of power is shown on the chart. However, the description in the patent, Exhibit No. 59, on page 1, lines 51 to 54, state, "any suitable motive power for imparting motion may be used."

Q. Referring to Figure 2 of the drawings on the chart, Exhibit 60, will you point out what part, if any, in that figure is the one which receives motion from such a source of power as you have described?

A. The yellow reversing clutch mechanism mainly consisting of friction drums, small b-1, small b-2 and small c, receive the power from the source of power.

Q. And what part in that Figure 2 is connected to the source [561] of power, and by what means?

(Testimony of Gustav A. Grab.)

A. The belt pulley, small b, not colored, receives the power from the source of power and transmits it through the shaft on which this belt pulley is keyed and on which the clutch members are also fastened.

Q. Referring to Figure 1 on the Dingee drawings on Exhibit 60, will you indicate how the motion transmitted through the clutch mechanism as you have described is employed to move the purple load lifting means?

A. The reversing clutch mechanism drives the yellow worm gearing consisting of worms small c-1 and worm gear small d-1, which drives a cable drum on which a cable, capital A-3 is wound. This cable passes over the yellow pulleys at the top of the structure and is fastened to the top of the purple load lifting means.

Q. In figure 2 of the Dingee drawings on Exhibit 60 what, if anything, do the parts marked large E-1 and large E-2 do in the operation of the mechanism as a whole?

A. The yellow parts marked capital E-1, capital E-2, are part of the clutch engaging mechanism.

Q. Now I notice in Figure 1 of the Dingee drawings on Exhibit 60 a brown structure marked large F. Will you explain what that mechanism is?

A. The brown structure marked capital F is an endless cable for manually operating the reversing clutch mechanism.

(Testimony of Gustav A. Grab.)

Q. In Figure 2 on Exhibit 60 will you explain how that brown cable for operating the clutch is connected with the clutch for the accomplishment of that function?

A. This brown cable passes through slotted clutch operating lever capital E-4. This lever incidentally, is shown in dotted lines and is fastened to clutch operating shaft, capital E.

The Master: E-4? Oh, I get you.

(Witness indicates on drawing.) [562]

The Master: All right. Go ahead.

The Witness: Lugs are fastened to this cable above and below this lever and are indicated by the letters small f-2.

Q. (By Mr. Fryer) In Figure 1 of Exhibit 60 I notice red members F-1, large F-1 on the brown cable you have described, and a red member A-1 on the purple load lifting means. Will you explain what those red devices are in the Dingee construction?

A. Those red members are the automatic stop members.

Q. What do they do in the operation of the Dingee machine?

A. These red members automatically return the clutch to inoperative position whenever they are actuated by the load lifting means reaching its upper or lower limits.

Q. And just how did they do that?

A. Red arm a when fastened to the top of the load lifting means strikes lug F-1 at the end of its

(Testimony of Gustav A. Grab.)

upward travel, I mean at the end of the upward travel of the load lifting means, and through the medium of the endless cable draws the reversing clutch to neutral position.

Q. On Exhibit 60 I see some orange-colored mechanism designated by the reference character e-4. Will you explain what that device is in the Dingee machine?

A. The orange mechanism e-4 is the automatic brake.

Q. When does that automatic brake function in the operation of the Dingee machine?

A. This brake is automatically applied whenever the power transmission means is returned to in-operative or neutral position, either manually or automatically.

Q. What is it in this Dingee construction which makes that orange-colored brake mechanism operate automatically when the clutch is returned to neutral?

A. The brake lever e-4 is mounted on an orange eccentric e-1. This eccentric is keyed to the clutch operating shaft E and functions whenever the clutch operating shaft is moved. [563]

Q. And I notice that on Exhibit 60 the structure at the extreme left including the part A-2 and two sheaves in the upper portion of the frame have not been colored. Will you explain what that uncolored portion of the Dingee structure on Exhibit 60 is?



(Testimony of Gustav A. Grab.)

A. The structure shown in Figure 1 is a duplex system. The patent Exhibit Number 59 makes it optional to use a single load lifting means, and we have elected to only color this single load lifting means.

Q. Well, I will now ask you to look at that small model on the table near you and ask you to state whether or not you had anything to do with its construction?

A. Yes, I arranged for and directed the making of this model.

Q. Was anything used by you as a guide in the construction of that model?

A. Yes, I used the Dingee patent, Exhibit Number 59, to guide me in the construction of this model.

Q. What can you say, then, as to how the construction and arrangement of the parts in the model and their operation compare with the construction, arrangement and operation of the parts shown in Figures 1 and 2 of the Dingee patent, Exhibit 59?

A. They are substantially the same.

Mr. Fryer: We now offer in evidence the model identified by the witness and ask that it be marked Respondents' Exhibit 61.

The Master: Is there objection?

Mr. Geisler: No, Your Honor.

(The model referred to was thereupon received in evidence and marked Respondents' Exhibit 61.)

(Testimony of Gustav A. Grab.)

Q. (By Mr. Fryer) Will you please explain what relationship, if any, exists between various colors appearing in the Dingee model, Respondents' Exhibit 61, and the colors appearing on the Dingee chart, Respondents' Exhibit 60?

A. The colors on parts on the model correspond with identical [564] parts colored the same in the chart in Exhibit 60.

Q. Is the Dingee model, Respondents' Exhibit 61, capable of operation under its own power?

A. Yes, it is.

Q. And will you state whether or not such operation under its own power is substantially identical with the described operation of the Dingee mechanism shown and described in the Dingee patent?

A. Yes, it is.

Q. I have now started the motor in the Dingee model and I will ask you to operate the manual control for the clutch to illustrate how such means can be employed to initiate movement of the load lifting means in an upward direction.

(The witness here demonstrated with Respondents' Exhibit 61.)

Q. I notice that in the operation just initiated by you the load lifting device colored purple in the Dingee model moved upwardly and then came to a stop without any further manipulation of the model by you. Will you explain what caused that operation?

(Testimony of Gustav A. Grab.)

A. The red arm fastened to the top of the load lifting means automatically engaged the red stop on the brown cable and drew the clutch to neutral position.

Q. Now will you operate the Dingee model so as to initiate downward movement of the load lifting means?

A. Yes. (Witness here demonstrated with Respondents' Exhibit 61.)

Q. I observe that after having initiated downward movement of the purple load lifting means in the Dingee machine by manually operating the brown cable the purple load lifting means came to a stop without further manipulation on your part. Will you state what caused that operation in the model?

A. The red arm fastened to the top of the load lifting means contacted the red stop which is fastened on the brown cable [565] below this arm and automatically drew the clutch to neutral position when the load lifting means reached its lower limit.

Q. And when that occurred what if anything happened to the orange-colored mechanism associated with the yellow friction clutch?

A. The orange brake was automatically applied on the orange flange of the—of a part of the reversing clutch mechanism.

Q. I notice that in its present condition the Dingee model has its motor running and one shaft of the reversing clutch mechanism is rotating while

(Testimony of Gustav A. Grab.)

one of the three friction surfaces is held stationary. Will you state whether or not that is the neutral position of the reversing clutch mechanism?

A. Yes, that is the neutral position of the clutch mechanism.

Q. Is there anything in the condition of that orange-colored mechanism with the clutch in that neutral position which indicates whether or not the orange mechanism is performing any function?

A. The orange mechanism is applied on the stationary clutch member.

Q. And can you tell that in any way by inspection of that orange-colored brake mechanism?

A. Yes, it plainly contacts the clutch member which is stopped.

Q. Now will you initiate movement of the load lifting means again, if you will, and point out how the brake functions when the clutch is removed from neutral position? That is, point out the condition of the brake when the clutch is no longer in neutral.

A. (Witness demonstrating with Respondents' Exhibit 61.) The brake now plainly does not contact this clutch member I mentioned before and the brake is out of engagement.

Q. Will you now explain the function and operation of this yellow-colored shaft extending longitudinally through the frame of the Dingee model and having the forked lever colored yellow extending outwardly and engaging the brown endless cable. [566]



(Testimony of Gustav A. Grab.)

A. When I operate the brown cable I move the yellow shaft—the yellow lever, rather, and thereby turn the shaft, and through the eccentric at the extreme end of the opposite,—at the opposite end to the end to which the lever is fastened replace the clutch into operative position (demonstrating).

Q. That is, the yellow horizontal shaft has at one end two eccentrics, one colored orange for operating the brake and one colored yellow for operating the clutch, is that your understanding?

A. Yes.

Q. And at the opposite end that shaft has a forked lever for engagement by the brown cable so that the shaft may be rocked in the manner you have previously described in the operation of the machine?

A. Yes.

The Master: What was that again please?

(The witness again demonstrated with Respondents' Exhibit 61.)

Mr. Fryer: If Your Honor has any further questions we will be glad to——

The Master: No, I think not.

Mr. Fryer: That will terminate the examination with respect to the model for the time being. From your experience in constructing lumber carriers and lift trucks will you state whether or not it would be a practical thing to utilize the Dingee mechanism shown in the model Respondents' Exhibit 61 in a portable elevator adapted for not only lifting but hauling loads?

(Testimony of Gustav A. Grab.)

A. It would only require a small amount of mechanical skill to mount this device on wheels or on a truck and thereby convert it into a portable elevator.

Q. Why do you say it would require no great amount of mechanical skill to do that? [567]

A. I have seen a number of similar devices mounted on wheels and trucks and have seen them described in a prior patent.

Q. The prior patent you refer to is the patent to Nicholson Number 1340458? A. Yes.

Mr. Geisler: What is that number again, please?

Mr. Fryer: That is Number 1340458, Mr. Geisler.

Mr. Geisler: What is the date of that, please?

Mr. Fryer: May 18th, 1920. We now offer in evidence the patent referred to by the witness and ask that it be marked Respondents' Exhibit 62.

Mr. Geisler: I call to Your Honor's attention, also, that this is merely a prior art patent, not cited as anticipation.

The Master: I understand that to be the fact.

Mr. Fryer: It is not pleaded in the answer in support of the technical defense of anticipation, Your Honor.

The Master: It will be received for that purpose and that purpose only.

(Said patent Number 1340458 to Nicholson was thereupon received in evidence and marked Respondents' Exhibit 62.)

(Testimony of Gustav A. Grab.)

Q. (By Mr. Fryer) Have you studied and do you understand the construction and operation of the mechanism shown in the Nicholson patent, Respondents' Exhibit 62? A. Yes, I do.

Q. I now show you a chart comprising four figures and ask you to state whether or not you have compared those figures on the chart with the drawings of the Nicholson patent, Respondents' Exhibit 62? A. Yes, I have.

Q. And will you state whether or not those figures on the chart before you are true and correct reproductions of the corresponding figures of the Nicholson patent except for the colors appearing on the chart? [568]

A. Yes, they are.

Q. And will you state, also, what that language is which appears in the lower right-hand corner of the chart before you?

A. The language is a copy of claim 4 of the patent in suit.

Mr. Fryer: We now offer in evidence the chart identified by the witness and ask that it be marked Respondents' Exhibit 63.

Mr. Geisler: No objection, except that the recitation that it is claim 4 is not included in the exhibit.

The Master: It is understood from the statement of counsel that the legend appearing upon the exhibit in question is not found in, but is a copy of, the claim 4 of plaintiff's patent. That is correct, is it not?

(Testimony of Gustav A. Grab.)

Mr. Fryer: Let me have that statement again, please.

(The statement by the Master was thereupon read.)

Mr. Fryer: That is correct, Your Honor.

The Master: With that understanding the exhibit will be received.

(The chart referred to was thereupon received in evidence and marked Respondents' Exhibit 63.)

Q. (By Mr. Fryer) Now, briefly, will you state what mechanism shown in the Nicholson machine is represented by each of the various colors which are appearing on the chart Exhibit 63?

A. The green mechanism on the Exhibit 63 is the frame, the purple mechanism is the load lifting means, the yellow mechanism is the power transmission means, the red mechanism is the automatic stop means, and the orange mechanism is the automatic brake.

Q. Will you state whether or not that green frame mechanism of Nicholson on chart Exhibit 63 is capable of standing by itself independently of the brake mechanism which is shown associated with that green frame on the chart?

A. Yes, it is.

Q. How is that accomplished in the Nicholson construction? [569]

A. By unfolding legs number 8 and withdrawing the truck or wheels from under the green frame.



(Testimony of Gustav A. Grab.)

Q. And when the truck or wheels are so withdrawn from beneath the green frame of the Nicholson structure on Exhibit 63 will you state whether the elevator mechanism is capable of operation to raise or lower a load?      A. Yes, it is.

Q. Now, in the Nicholson construction after the truck or wheels have been removed from under the green frame will you state how that green frame and the elevator mechanism mounted therein compares in construction and mode of operation with the elevator mechanism found in the Dingee model?

A. It is substantially the same.

Q. I now direct your attention to the Dingee construction as illustrated in the Dingee model and ask you to state how the construction and mode of operation of the reversing clutch of that model compares with that of the friction reversing clutch in the defendant Clark & Wilson's Willamette machine?

A. They are substantially the same, because both are reversing mechanisms.

Q. Referring now to the Dingee model, I will ask you to state how the elevator mechanism contained therein compares with the defendant Clark & Wilson's Willamette carrier inasfar as the means provided for automatically terminating movement of the load lifting means is concerned?

A. They are substantially the same.

Q. Why do you say that?

(Testimony of Gustav A. Grab.)

A. They are both means to stop the power transmission means when the load lifting means reaches a predetermined extent in either direction without a load or with a load.

Q. And how does that Dingee construction compare with the construction in defendant Clark & Wilson's Willamette carrier insofar as the provision of any manual means for operating the clutch is concerned? [570]

A. They are substantially the same.

Q. Why so?

A. Both have means for manually placing the power transmission means into operative or inoperative position.

Q. Will you state whether or not you have any difficulty in coming at that conclusion of substantial identity between those manual means in Dingee and in the Willamette machine in view of the fact that the remote control between the handle and the clutch in the Willamette machine is a system of links and levers, whereas the remote control in the Dingee model is a flexible endless cable?

A. I have not.

Q. Why not?

A. Both are a form of remote control for the same mode of operation and function.

Q. Will you state how the brake mechanism of the defendant Clark & Wilson's Willamette carrier compares with the automatic brake mechanism in the Dingee model which you have pointed out and is

(Testimony of Gustav A. Grab.)

colored orange in that model, insofar as their functions are concerned?

A. They are substantially the same.

Q. And what is your reason for saying that?

A. The brake—the orange brake mechanism in the model, as well as in the Willamette carrier, in the Clark & Wilson Willamette carrier, is automatically applied whenever the power transmission means is returned to neutral position manually or automatically.

Q. Going back now to the Nicholson construction, will you briefly describe——

The Master: Pardon me, may I ask a question here?

Mr. Fryer: Yes, Your Honor.

The Master: Do I understand that in Dingee you can throw the clutch into neutral by manual operation? A. Yes, Your Honor. [571]

Mr. Fryer: Will you perform that demonstration on the Dingee model for the Court, please.

(The witness here made a demonstration with Respondents' Exhibit 61.)

The Master: All right.

Q. (By Mr. Fryer) Going back to the Nicholson construction for a moment, will you briefly explain how the purple load lifting means in that mechanism is arranged for movement in the machine as a whole, using the chart Exhibit 63 for that purpose.

(Testimony of Gustav A. Grab.)

Q. In Exhibit 63 the purple load lifting means or platform is arranged to move up and down in the vertical guides, in the vertical green guides number 3 of the frame.

A. In that Nicholson elevator or carrier what sort of power is employed for operating the hoisting mechanism?

A. An electric motor is shown in the patent Exhibit No. 62. However, it is stated on page 1, lines 76 to 70, "Other types and varieties of power plants which are found suitable may be substituted for that shown."

Q. Briefly, will you describe how the yellow power transmitting means of the Nicholson construction, Exhibit 63, functions to transmit power to the load lifting means and move it up or down in the green frame?

A. The power is transmitted through the reversing mechanism in housing number 23 to worm gearing number 22 and through cable number 51 to the load lifting means. The cable 51 is wound on cable drum number 21, which is driven by the worm drive mechanism number 22.

Q. Will you state whether or not there is anything in the Nicholson patent which shows or describes the particular construction or arrangement of the parts within the casing 23 which controls the transmission of power?

A. The only description is the statement that it is a reversing mechanism, without describing the same, in the box 23.



(Testimony of Gustav A. Grab.)

Q. With respect to the drawings, all that you find, then, is merely that housing with an operating handle extending to it, but nothing to show the internal construction of that mechanism, is that correct?      A. Yes.

Q. What is the function of that yellow part 23 in the Nicholson mechanism as a whole, inasfar as the operation of the purple load lifting means is concerned?

A. The mechanism in part 23 is a reversing mechanism to place the power transmission means into operative or inoperative position.

Q. How about controlling the direction of travel of the purple load lifting means?

A. By moving brown handle number 25 into up or down position the direction of travel is controlled thereby, respectively.

The Master: 25 is that handle?

A. Yes, Your Honor.

The Master: Where is it shown there—oh, yes, I guess it.

Q. (By Mr. Fryer) Will you give us a brief description of how the red means in the Nicholson chart functions to automatically stop movement of the load lifting means?

A. A red stop arm number 44 which is fastened to the top of the load lifting means contacts the red lug or stop on the endless cable number 71 when the load lifting means reaches its upper limit of travel. Upon the arm 44 contacting this lug it auto-

(Testimony of Gustav A. Grab.)

matically returns the power transmission means to neutral position.

Q. And how does it do that?

A. The cable,—the endless cable, the red endless cable, [573] number 71, turns red shaft or sleeve number 74, which has a bevel gear attached to one end of it and which actuates a corresponding bevel gear number 76. This corresponding bevel gear number 76 is fastened to reversing mechanism operating shaft number 24, which is shown in red in Figure 1 of the Exhibit 63.

Q. Will you now explain how the orange-colored mechanism in the Nicholson construction shown on Exhibit 63 functions.

A. The orange mechanism is a brake which is automatically applied whenever the power transmission means is returned to neutral position either manually or automatically.

Q. Are the various mechanical parts of that orange-colored automatic brake on Exhibit 63 shown in detail in the Nicholson patent?

A. No, they are not.

Q. Now that you have described the functions of the various parts of the Nicholson construction will you explain very briefly how the machine as a whole is made to operate to perform its intended work?

A. The purple load-lifting means or platform number 41 is pushed under a load, or a load is placed thereon. The operator then moves the brown operating handle number 25 to up position and

(Testimony of Gustav A. Grab.)

thereby through the mechanism in housing number 23 causes the power transmission means to lift the load lifting means in the upward direction. When the load lifting means reaches its upper limit the red automatic stop mechanism heretofore described automatically draws the reversing mechanism to neutral position and thereby stops the hoisting operation and at the same time automatically applies the orange brake. To lower a load the operation is substantially the same in reverse.

Q. In that operation of the Nicholson carrier that you have just described will you state whether or not the presence or absence of a load on the load lifting device had anything to do [574] with the termination of upward or downward movement of the load lifting means? A. No, it did not.

Q. Would you say, then, that the automatic stops contained in this Nicholson device for automatically terminating upward or downward movement of the load lifting means are controlled by the load or controlled by the lift mechanism itself?

A. They are controlled by the lift mechanism and not by the load.

Q. Will you state whether or not in your experience in the carrier business since 1921 you have found that carriers of the general type shown on the Nicholson chart, Respondents' Exhibit 63, have been used in the trade?

A. Yes, I have seen numerous structures of this design in operation in warehouses, terminals and

(Testimony of Gustav A. Grab.)

lumbering operations to handle various types of material, including lumber.

Q. Will you state how the function of the purple load lifting means of the Nicholson patent shown on the chart Exhibit 63 compares with the function of the load lifting means in defendant Clark & Wilson's Willamette carrier?

A. It is substantially the same.

Q. And how does the function of the yellow means on the Nicholson chart Exhibit 63 for transmitting motion from a source of power to the load lifting means compare in function with the means for transmitting motion from the engine to the load lifting means in defendant Clark & Wilson's Willamette carrier?

A. It is also substantially the same.

Q. Likewise, will you state how the respective functions of the automatic stop mechanism in Nicholson compares with that of the automatic stops in defendant Clark & Wilson's Willamette carrier?

A. It is also substantially the same.

Q. And is your answer also the same with respect to the [575] automatic brake in both Nicholson and in defendant's Willamette carrier?

A. Yes, it is.

Q. Now will you point out some of the factors which lead you to state that the functions of these various mechanisms in defendant Clark & Wilson's Willamette carriers are substantially the same as



(Testimony of Gustav A. Grab.)

the functions of the corresponding mechanisms in the Nicholson construction?

A. Both have a frame, a purple load lifting means, a yellow power transmission means which can be placed into operative or inoperative position manually and which can be placed into neutral position automatically. Both have an automatic stop mechanism which functions automatically whenever the load lifting means reaches a predetermined position in either direction, and both have an orange brake which is automatically applied whenever the power transmission means is returned to neutral or inoperative position either manually or automatically.

Q. Do you find any obstacle in arriving at that conclusion in the fact that in the Nicholson mechanism on Exhibit 63 the source of power is indicated in the drawings as an electric motor, whereas the source of power in the Willamette machine is a gasoline engine?

A. No, I do not.

Q. Why not?

A. Because I have seen motors, electric motors or gas motors, used at will in similar devices and both perform the same function.

Q. In your opinion is it or is it not any obstacle to the identity of construction, mode of operation and function which you have found between Nicholson and the Willamette carrier that in Nicholson the red automatic stops comprise an endless cable,

(Testimony of Gustav A. Grab.)

whereas in the defendant Clark & Wilson's carrier those stops are not operated by cable but by links and levers? [576]

A. No, both are a form of remote control performing the same function.

Mr. Fryer: We now offer in evidence a copy of the patent to French and Pavey, Number 1360917, issued on November 30, 1920, and ask that that be marked Respondent's Exhibit Number 64.

Mr. Geisler: That is also one of those patents, if Your Honor please, cited merely as prior art.

The Master: I so understood it to be?

Mr. Fryer: Yes, Your Honor. It is not pleaded in the answer as an anticipation.

(Said copy of Patent 1360917 to French and Pavey was thereupon received in evidence and marked Respondents' Exhibit Number 64.)

Q. (By Mr. Fryer) Have you read and do you understand the patent to French and Pavey, Respondents' Exhibit 64? A. Yes.

Q. Do you understand the construction and operation of the machine shown in that patent?

A. Yes, I do.

Q. And will you look at the chart which is now before you and state whether or not you have heretofore compared the drawings on that chart with Figures 1, 2 and 3 of the drawings of the *Franch* patent Exhibit 64? A. Yes, I have.

(Testimony of Gustav A. Grab.)

Q. And will you state whether or not the figures on that chart are true and correct reproductions of Figures 1, 2 and 3 of the drawings of the French patent, Exhibit 64, except for the coloring on the chart?      A. Yes, they are.

Q. And the printed matter appearing on this chart in the lower right-hand corner I assume is again a copy of claim 4 of the [577] Gerlinger patent in suit?      A. Yes, it is.

Mr. Fryer: We now offer in evidence the chart of the French et al drawings and ask that it be marked Respondents' Exhibit 65.

Mr. Geisler: Excluding again, Your Honor, the legend giving the claim 4 of the patent in suit.

The Master: With the understanding that the legend is not part of the description or claims of the patent in question, but is a repetition of the claim 4 of the complainant's patent in suit, it will be so received. It becomes Exhibit 65.

(Said chart was thereupon received in evidence and marked Respondents' Exhibit 65.)

Q. (By Mr. Fryer) In the chart of the French patent, Exhibit 65, will you state whether the various colors which appear thereon designate the same kinds of mechanisms which you have heretofore indicated by those same colors?      A. Yes.

Q. What kind of a source of power is employed in the form of machine shown in the French patent Exhibit 64?

(Testimony of Gustav A. Grab.)

A. An electric motor is shown, but the description on page 1 of Exhibit 64, line 55 to line 59—or, rather, lines 55 to 57, state, “It may be of any well known construction”, which I assume to indicate that any suitable power may be used.

Q. Will you briefly describe how the purple load lifting means of the French patent is arranged for movement in the green frame on the chart Exhibit 65?

A. The purple load lifting means is arranged to move up and down in the vertical green guide or guides number 21.

Q. In the chart of the French construction, Exhibit 65, how does the yellow-colored means for transmitting motion from the source of power to the load lifting means work, briefly?

A. The electric motor number 9 transmits power to the yellow gearing mechanism. The power to this mechanism is engaged [578] through a reversing mechanism in the housing number 20 and is transmitted to the load lifting means by a cable which is actuated by a drum which in turn is driven by the gearing heretofore mentioned.

Q. Now will you explain for us, briefly, how the red mechanism on the French chart, Exhibit 65, operates for automatically moving the power transmitting means to neutral when the load lifting means reaches a predetermined point in either direction?



(Testimony of Gustav A. Grab.)

A. The red stop mechanism automatically returns the power transmission means to neutral in the following manner: The traveling nut number 54 contacts lugs or collars which are fastened to the main shaft, and upon contacting these collars it rotates the red frame number 53a in Figure 3. The rotation of this frame through sprocket 51a and endless chain number 52 rotates the controller shaft number 49 through the sprocket number 51 and over which the endless chain passes and which sprocket is keyed to the controller shaft.

Q. And when that red mechanism rotates the yellow-controller shaft 49 what does it do to the controlling mechanism? What position does it put it in?

A. It returns the reversing mechanism to neutral or inoperative position.

Q. What effect, if any, has that rotation on the shaft 49 by the red automatic stop mechanism upon the orange colored brake mechanism appearing upon the chart of the French patent, Exhibit 65?

A. Its rotation automatically applies the orange brake whenever the red stop mechanism returns the power transmission means to neutral position, as heretofore described, or if the power transmission means is returned to neutral position manually.

Q. What effect on the operation of the machine as a whole has this automatic application of the orange brake? Or in other words what does apply-

(Testimony of Gustav A. Grab.)

ing the orange brake do to the operation of the machine as a whole?

A. In this case it holds the load in any position in which the power transmission means has stopped the load lifting. [579]

Q. (By Mr. Fryer) Now will you briefly describe how the orange carrier shown on the chart, Exhibit 65, performs its various operations when it is used to do its intended work?

A. When the purple load lifting means is in its lowermost position it is pushed under a load, or a load is placed thereon; the operator then moves the brown handle, number 20-a, to hoisting position and thereby engages through the mechanism in housing, in yellow housing, number 20, the power means to raise the load lifting means. When the load lifting means reaches its uppermost limit the red mechanism actuates through the remote control the control shaft 49 and places it into neutral or inoperative position, thereby stopping the load lifting means, at the same time applying the orange brake mechanism. To lower a load the operation is substantially the same in reverse.

Q. Will you explain a little more fully how travel of the load lifting means to its uppermost position is accompanied by movement of the red stop mechanism to a point where it will return the power controlling device to neutral?

(Testimony of Gustav A. Grab.)

A. The travel nut number 54 travels on the threaded main shaft, which is threaded in time or to coincide with the proper amount of travel of the load lifting means. In other words, when the load lifting means reaches the limit in one direction the nut will have traveled the full distance or the exact distance to engage one of the lugs or stops which actuates the red mechanism.

The Master: May I ask, this traveling nut 54 is not engaged with 53-a, is it?

A. The traveling nut 54 engages 53-a when the lug or the stop collar number 59, which rotates with the main shaft—

The Master: Well, when it does that it turns?

A. It turns the entire controller.

The Master: Turns the entire frame 53-a?

A. Just a small portion of a revolution.

The Master: Yes; I understand. [580]

A. And it transfers that small portion of a revolution to the operating shaft 49 to draw the reversing mechanism into neutral position at the end of this shaft 49.

Q. (By Mr. Fryer) While the nut 54 is traveling along the shaft 33 by reason of the turning of the thread on the shaft inside of the nut, how are the ends of that member 54 moving with respect to the side parts of the frame 53-a?

A. They are moving horizontally.

Q. Sliding along that frame?

(Testimony of Gustav A. Grab.)

A. Sliding along that frame.

Q. That drum 18 in Figure 3 is the drum on which the cable is wound to raise or lower the load lifting means?

A. Yes.

Q. And the shaft on which this red stop mechanism is, is also the shaft on which that cable drum is mounted?

A. Yes. It is numbered 33.

Mr. Fryer: If your Honor has any further questions I will be glad to have the witness answer them.

The Master: I don't yet follow this drawing so as to understand how, when 53-a makes a partial rotation, it affects the brake mechanism.

Mr. Fryer: I will cover that, your Honor.

Q. When the red endless chain rotates the controller shaft 49, will you explain, by reference to Figure 2 of the French patent, how such rotation of the controller shaft applies the orange colored brake? And in doing that please explain the relationship between the cam on the shaft 49 and the brake actuating rod 46.

A. When the shaft 49 is rotated, as heretofore described, it also rotates cam 48, which is keyed to this shaft. This cam 48 has a low place on it into which the end of the brake shaft drops and allows spring number 50 to push the brake into engaged position.

Q. Is that cam and cam follower on the shaft 46 shown in Figure 2? [581]

The Master: Shaft 46?

Mr. Fryer: Link 46, your Honor (indicating).



(Testimony of Gustav A. Grab.)

The Master: Oh, yes; I see. Let me hear that question again.

(Last question read.)

A. Yes. The cam follower is described as a bearing member on end of rod 47 at this point (indicating).

Q. (By Mr. Fryer): In what kind of lines, dotted or solid lines, are the cam and cam follower shown in Figure 2?

A. They are shown in dotted lines on Figure 2, the cam 48 and the follower 47.

Q. When the low spot on the cam shown in dotted lines in Figure 2 arrives at the position shown in Figure 2, that allows the brake operating rod 46 to move upwardly?

A. Yes, it does.

Q. And that upward movement of that brake operating rod does what to the brake shoes surrounding the brake drum?

A. It applies the brake shoes around the brake drum.

Q. That is, by spring pressure or by what means?

A. By spring pressure. The lower end of spring 50 is seated on a bracket indicated but not numbered.

Q. Now when the cam follower on the end of the brake operating shaft 46 is riding on the high part of the cam shown in dotted lines in Figure 2 mounted on the shaft 49, what happens to the brake?

(Testimony of Gustav A. Grab.)

A. The brake is released as the spring is compressed at that time.

Mr. Fryer: That mechanism is a little difficult in this drawing, your Honor, and if you have any questions that you would like to have the witness' attention particularly directed to I shall be glad to ask them.

The Master: I don't know whether I can direct them. Perhaps I can ask a question here, to see if I understand this.

Mr. Fryer: All right.

The Master: You have spoken of 48, which seems to be a horse- [582] shoe shaped mechanism on the outside of the drive—not the drive shaft but the operating shaft 49, but I take it that the indented portion of the cam you refer to is the dotted line immediately under this shaft 49?

A. Yes.

The Master: But is that any part of 48?

A. No. It is a part of 47.

The Master: 47 is the upper part of 46 which engages in the lowered or indented portion of the cam, isn't it? A. Yes.

The Master: Well, ought that be colored in red, or oughtn't that be in orange?

A. It should be in orange. It is shown in orange here. You see the red sprocket on this side.

The Master: Oh, I see.

A. And the orange is on the other side of the red sprocket.

The Master: All right. Thank you.

(Testimony of Gustav A. Grab.)

A. And therefore it has not been colored.

Q. (By Mr. Fryer): Is it your understanding that the lead line extending from the reference character 48 extends to that horseshoe shaped structure shown in Figure 2 or extends inwardly towards shaft 49 to the dotted periphery of the cam of the shaft 49?

The Witness: I beg your pardon, I didn't follow that question.

Mr. Fryer: May I have the question read, please?

(Last question read.)

A. The reference figure 48 points to the dotted cam.

Q. In the operation of the French carrier which you have described, did the presence or absence of the load on the load lifting device have anything to do with the operation of the automatic stop mechanism which you have described?

A. It does not.

Q. Would you say then that the stop mechanism of the French carrier [583] is a lift control stop mechanism or a load control stop mechanism?

A. It is a lift control mechanism.

Q. How does the function of the yellow means for transmitting motion from the source of power to the load lifting means in the French construction of Exhibit 65 compare with the means in defendant Clark & Wilson's Willamette carrier for transmitting motion from the source of power to the load lifting means?

(Testimony of Gustav A. Grab.)

A. It is substantially the same.

Q. What are the factors which indicate such identity to you?

A. Both are means for transmitting power from a source of power to the load lifting means, and both have mechanisms to be placed into operative or inoperative position manually as well as automatically—manually, and into inoperative position automatically.

Q. In your opinion how does the red automatic stop mechanism on the French carrier shown on Exhibit 65 compare in function with the automatic limit stops in defendant Clark & Wilson's Willamette carrier?

A. It is substantially the same.

Q. And what factors indicate to you such identity in function between those two mechanisms?

A. The red automatic stop mechanism in both devices returns the power transmission means to neutral or inoperative position whenever the load-lifting means reaches a predetermined position in either direction.

Q. And in your opinion does the function of this orange colored brake mechanism of the French patent shown on Exhibit 65 compare with that of the automatic brake on the hoisting mechanism in defendant Clark & Wilson's Willamette carrier?

A. It is substantially the same.

Q. And what factors indicate such identity to you in those two mechanisms?



(Testimony of Gustav A. Grab.)

A. The orange brake mechanism in both devices is automatically applied whenever the power transmitting means is placed into neutral position either manually or automatically. [584]

Q. After that comparison of function of those parts between the defendant Clark & Wilson's Willamette carrier and the machine of the French patent shown on Exhibit 65, what would you say as to the identity or lack of identity between the structure, mode of operation and function of the French carrier as a whole and the Willamette carrier as a whole? A. They are substantially the same.

Q. Is that substantial identity in your opinion affected in any way by the fact that in the drawings of the French patent an electric motor is used in lieu of a gasoline motor, as in the Willamette carrier?

A. It is not. The function and mode of operation would be the same with any suitable power.

Q. Would that identity in construction, mode of operation and function of the two machines as a whole be affected in any way in your opinion by the fact that in the French carrier shown on Exhibit 65 the red automatic stop mechanism is actuated by stops on the main drive shaft, whereas in the Willamette carrier a stop mechanism is actuated by members carried on the load lifting means proper?

A. They are not. Both are mechanical equivalents and perform the same function.

(Testimony of Gustav A. Grab.)

Q. Will you state whether or not in your experience in the carrier business since 1921 you have seen used in industry carriers having substantially the same construction and mode of operation and function as the carrier shown in the French patent and illustrated on the chart, Exhibit 65?

A. Yes. I have seen numerous similar devices being used for elevating and carrying loads from place to place on the same floor. I have seen them pick up a load on one floor and place the load onto a higher floor, and I have seen them in various operations handling all types of materials, including lumber.

Q. And do I understand your testimony correctly to be that you [585] have seen in use in one locality solely for elevating between two different levels in one spot?      A. Yes, I have.

Mr. Fryer: I now offer in evidence the Towson & Cochran patent, No. 1,337,804, issued April 20th, 1920, and ask that that be marked Respondents' Exhibit 66.

The Master: Is that a cited patent?

Mr. Geisler: Yes, your Honor. No objection.

The Master: It will be received as Respondents' Exhibit 66.

(Said patent No. 1,337,804 issued to Towson & Cochran was thereupon received in evidence and marked Respondents' Exhibit 66.)

Q. (By Mr. Fryer): Have you heretofore studied the Towson patent, Respondents' Exhibit

(Testimony of Gustav A. Grab.)

66? A. Yes, I have.

Q. And do you understand the construction and operation of the mechanism shown in the drawings and described in the specification of that patent?

A. Yes, I do.

Q. Will you look at the chart which is now placed before you and state whether you have compared Figures 1, 5 and 6 appearing on that chart with the similarly numbered Figures of the Towson patent, Respondents' Exhibit 66?

A. Yes, I have.

Q. And will you state whether or not those Figures 1, 5 and 6 on that chart are true and correct reproductions of Figures 1, 5 and 6 of the Towson patent, Exhibit 66, except for the coloring appearing on the chart?

A. Yes, they are.

Q. And the language appearing in the lower right hand corner of that chart I assume is again a copy of claim 4 of the Gerlinger patent in suit?

A. Yes, it is.

Mr. Fryer: We now offer in evidence the chart of the Towson [586] drawings and ask that it be marked Respondents' Exhibit 67.

Mr. Geisler: No objection, except I move the exclusion of the legend.

The Master: Well, upon the statement of counsel, with that understanding it will be received. It becomes Respondents' Exhibit 67.

(The chart of the Towson patent drawings referred to was thereupon received in evidence and marked Respondents' Exhibit 67.)

(Testimony of Gustav A. Grab.)

Q. (By Mr. Fryer): Will you state whether or not the various colors used on the chart, Exhibit 67, of the Towson patent, indicate the same mechanisms in the carrier shown on the chart as have been indicated by those same colors in the previous exhibits? A. Yes.

Q. Will you explain briefly how the purple load lifting means of the Towson carrier is mounted for operation in the green frame of the Towson machine?

A. The purple load lifting means is mounted in the green frame at points 26 and 31.

Q. And how is the portion of this load lifting device which carries the load moved upwardly or downwardly by means of that pivotal mounting?

A. The purple horizontal platform or load carrying platform is moved up and down by the changing of the position of the vertical toggle mechanism from full lines to dotted lines, or vice versa.

Q. That is, when the toggle links 34 and 40 are moved so as to approach a straight line the load lifting means is raised? A. Yes.

Q. And then those toggles are allowed to form an angle with each other the load lifting means is lowered; is that correct? A. Yes, that is correct.

Q. Now I understand the yellow colored means for transmitting power is the mechanism in Towson which produces this raising and lowering of the purple load lifting means? [587] A. Yes, it is.

Q. Will you explain briefly how the yellow mechanism in Towson operates to raise or lower the



(Testimony of Gustav A. Grab.)

purple load lifting means?

A. The yellow push and pull rod number 48, which is drawn in and out of yellow housing number 60 and has a screw and nut mechanism at the end which is in the housing, actuates the purple toggle mechanism from full line position to dotted line position, or vice versa.

Q. Will you now explain how the red mechanism on the chart, Exhibit 67, functions in the operation of the Towson carrier?

A. The red mechanism automatically returns the power transmission means to neutral position whenever the load lifting means reaches its upper or lower limits.

Q. What form of power transmission means is shown in this Towson patent for raising or lowering load lifting means?

Mr. Fryer: Well, strike that question and put it this way:

Q. Will you point out in the chart, Exhibit 67, what mechanism is employed in the Towson machine for transmitting upward motion to the load lifting means or downward motion, or for placing the power transmitting means in neutral?

A. A reversing mechanism shown in Figure 6 and colored in yellow.

Q. Is that mechanism which you have pointed out capable of being placed in position to move the load lifting means either upwardly or downwardly?

A. Yes.

Q. And is it also capable of being placed in po-

(Testimony of Gustav A. Grab.)

sition so as to be in neutral and not transmit any power to the load lifting means?      A. Yes.

Q. Now will you explain briefly what is provided in the Towson structure for operating that power transmitting means both manually and automatically?

A. The brown handle number 87, which is on the end of brown lever 86, is for manually operating this reversing mechanism. The red [588] stop mechanism automatically operates this yellow reversing mechanism whenever it is actuated by the load lifting means at its upper and lower limits.

Q. Now just briefly describe how that red mechanism of Towson does that work.

A. Whenever the load lifting means reaches either the upper or lower limit stops 93 and 94, which are fastened to horizontal red rod number 92, strike the red sleeve on bell crank lever number 85, which actuates the yellow reversing mechanism.

Q. Do I correctly understand, then, that the rod 92 slides back and forth through the part 91 attached to the bell crank lever 85 until one of the stops 93 or 94 strikes 91?

A. Yes, that is right.

Q. Briefly describe the means for automatically applying the brake to the transmitting means whenever this power controlling device is placed in neutral, found in the Towson carrier.

A. The automatic brake in this device is a magnetic brake shown in orange and numbered 100. This brake works on the well known magnetic prin-

(Testimony of Gustav A. Grab.)

ciple, which is automatically applied whenever the current discontinues to pass through it.

Q. Does the Towson patent show the internal construction of that magnetic brake 100?

A. It does not. It refers to a brake which was fully described in a former patent, and this reference is on page 1 of Exhibit 66, lines about 60 to 64.

Mr. Fryer: We now offer in evidence the patent referred to by the witness, it being the Cochran patent, No. 1,260,145, issued March 19th, 1918, and ask that that be marked Respondents' Exhibit 68.

Mr. Geisler: That is not cited in the answer, your Honor, so it is merely prior art.

Mr. Fryer: No; it is more than that, if your Honor please. It is listed in and forms a part of the disclosure of the Towson [589] patent already in evidence, and the purpose of offering it is merely to show the details of the construction and arrangement of brake 100, forming a part of the Towson disclosure.

Mr. Geisler: I haven't seen this. I paid no attention to it, since it wasn't cited, because sometimes a number of patents are cited in one patent, but unless they are specifically referred to as anticipating I don't think we are required to go out and make research. I don't know anything about it. It may be a mere detail, as counsel says.

The Master: I understand it is only offered as being a patent disclosure detail of the magnetic brake referred to in the Towson patent.

Mr. Fryer: Exactly. It is to complete the dis-

(Testimony of Gustav A. Grab.)

closure of the Towson patent, which has been pleaded.

The Master: Yes; and for that purpose it will be received. That becomes Exhibit 68.

(The patent No. 1,260,145 issued to Cochran was thereupon received in evidence and marked Respondents' Exhibit 68.)

Q. (By Mr. Fryer): Will you now briefly describe how the Towson carrier as a whole operates when it is used to perform its intended work?

A. The purple load lifting means is pushed under a load. The operator then moves brown handle number 87 to hoisting position, thereby actuating the reversing mechanism and starting the motor 67, which transmits power to the yellow power transmission means and draws the toggle mechanism into the dotted line position and thereby raising the load lifting means. When the load lifting means reaches its upper limit it automatically draws the reversing mechanism to neutral position thru the red automatic stop mechanism at the same time automatically applying the orange brake number 100. To lower the load or the load lifting mechanism the operation is substantially the same in reverse.

Q. In the Towson patent what is one of the particular uses which [590] the patentee states this carrier of his can be employed to perform?

A. This particular truck apparently was designed, as is stated in the patent, for charging furnaces, which experience has taught me is to charge



(Testimony of Gustav A. Grab.)

annealing ovens or furnaces.

Q. In your experience in the carrier business have you had occasion to manufacture or sell such furnace charging carriers or lift trucks?

A. I have been called upon to quote and I have quoted prices on our small Hyster carrier for doing the same work as described in this patent.

Q. When you refer to your small Hyster carrier, do you mean the lift truck shown on the photographs, Exhibits 42 and 43? And may the witness be shown those exhibits, please?

A. I have them here.

Q. Very well.

A. Yes. I refer to the trucks, or the truck shown in those two exhibits.

Q. From your experience in the carrier business will you state whether or not trucks having substantially the construction and operation of the carrier shown on the Towson chart, Exhibit 67, have been used in actual operation?

A. Yes, they have.

Q. What is your opinion with respect to the identity or lack of identity between the function of the load lifting means of the Towson carrier and the load lifting means in the Willamette Carrier?

A. They are substantially the same.

Q. What factors indicate that substantial identity to you?

A. Both have a frame; both have a load lifting means contained therein; both have a power transmission means to transmit power from a source of power to the load lifting means; both have mechan-

(Testimony of Gustav A. Grab.)

ism to place the power transmission means into operative or inoperative position manually, and to place the power trans- [591] mission means into inoperative position automatically and to automatically apply a brake whenever the load lifting means has reached a predetermined position in either direction and has automatically returned the power transmission means to neutral position.

Q. Now what can you say with respect to the similarity of form between the red automatic stops of the Towson carrier and the red automatic stops of the Willamette carrier as shown on the chart, Exhibit 52?

A. They are both substantially the same.

Q. What features of similarity lead you to that conclusion?

A. Both are a mechanism consisting of links and levers; both are in a horizontal position; and both have two stops, one a horizontal link and the horizontal link slides through another stop member.

Q. In your opinion would the fact that the power transmitting means of the Towson carrier comprises a like reversing switch detract in any way from the substantial identity that you find between the Towson carrier and the Willamette carrier?

A. No, it does not.

Q. Why not?

A. Because both are means to put the power transmission means in and out of operation and both are a reversing mechanism.

(Testimony of Gustav A. Grab.)

Q. Is the substantial identity which you find between the construction and mode of operation of the Willamette carrier and the Towson carrier affected or not affected by the fact that in the Towson mechanism a magnetic brake is automatically applied when the mechanism is placed in neutral, whereas a friction brake is employed in the Willamette carrier operated by other than magnetic means?

A. It is not. Both are a mechanical equivalent.

Q. Mr. Fryer: Shall we commence another subject, your Honor, or proceed?

The Master: I think we will proceed here for a moment or so. [592] I have got to wait until some other people come in anyway on another matter.

Mr. Fryer: We now offer in evidence a copy of the patent to Carr, No. 1,407,124, granted February 21st, 1922, and ask that it be marked Respondents' Exhibit 67.

(The patent No. 1,407,124 to Carr so offered was thereupon received in evidence and marked Respondents' Exhibit 69.)

Q. Have you heretofore studied the Carr patent, Respondents' Exhibit 69?      A. Yes, I have.

Q. Do you understand the construction and operation of the carrier mechanism shown therein?

A. Yes, I do.

Q. Will you look at the chart which has been placed before you and state whether you have compared Figure 1 and Figure 8 appearing upon that

(Testimony of Gustav A. Grab.)

chart with Figures 1 and 8 of the Carr patent, Exhibit 69?      A. Yes, I have.

Q. Are those Figures 1 and 8 on the chart true and correct reproductions of the corresponding figures of the Carr patent, Exhibit 69, except for the colors on the chart?      A. Yes, they are.

Q. And the language in the lower right hand corner of the chart I understand is, again, a copy of the claim 4 of the patent in suit?

A. Yes, it is.

Mr. Fryer: We now offer in evidence the chart identified by the witness and ask that it be marked Respondents' Exhibit 70.

Mr. Geisler: No objection, except to that legend.

The Master: Is the Carr a cited patent?

Mr. Fryer: Yes, your Honor.

Mr. Geisler: Yes. The legend on the chart is what my objection goes to. [593]

The Master: I understand that part is objected to.

Mr. Geisler: Yes, your Honor.

The Master: Upon the statement of the witness as to what has been added to the enlargement, it will be received.

(The chart containing Figures 1 and 8 of the Carr patent was thereupon received in evidence and marked Respondents' Exhibit 70.)

Q. (By Mr. Fryer): Will you state whether or not the color scheme on the chart, Exhibit 70, is



(Testimony of Gustav A. Grab.)

the same as that heretofore explained by you with respect to the previous prior structures?

A. Yes, it is.

Q. In this Carr machine how is the purple load lifting means arranged for movement in the green frame?

A. The purple load lifting means is arranged to move up and down in the green upright guides, numbered 24.

Q. What is used in this carrier as the means for moving the purple load lifting device up and down? That is, is it a cable or some other device?

A. It is a screw and nut mechanism.

Q. Will you describe briefly what mechanism is provided in the Carr machine for transmitting motion from the source of power to the load lifting means in either direction?

A. It is a screw and nut mechanism not described in this drawing.

Q. When you say "this drawing", you refer to——

A. In figure No. 1, on Exhibit 70.

Q. Well then, describe briefly for us the mechanism shown in yellow on the chart Exhibit 70, and explain how it works.

A. The mechanism shown in yellow is the means to place the power transmission means into operative or inoperative position. [594]

Q. In the drawings of the Carr patent is anything more indicated than the mere exterior of this

(Testimony of Gustav A. Grab.)

means which you have just described for doing that?

A. No. The reversing mechanism is simply indicated as a yellow box, called the control box number 69.

Q. Is there any handle extending out of that control box for operating whatever mechanism may be in there?      A. Yes.

Q. What is that handle number?

A. The brown handle, number 86, is the handle for operating the control or reversing mechanism in the box 69.

Q. And how does the movement of the handle 86 transmit the necessary motion to operate whatever mechanism is contained inside the box 69?

A. Through the brown link 88 and the yellow return link number 72.

Q. Now will you briefly describe how the red mechanism shown on the chart, Exhibit 70, functions in the operation of the Carr machine?

A. The red mechanism indicated by numbers 104 and 105 and 106 automatically returns the power transmission means to neutral when these red stops are actuated by the load lifting means at its upper and lower limits of travel in the green upright frame.

Q. Will you tell us a little more in detail just how that operation is carried out?

A. In the up motion the top roller number 49 shown in purple, and which is a part of the load lifting platform or carriage, contacts red stop 104

(Testimony of Gustav A. Grab.)

and draws the reversing means or the controlling means to neutral through the yellow linkage which leads to the controller box number 69. In the lowering operation the same roller 49 strikes the red stop mechanism number 105 and 106 at the lowermost position of its travel and also draws the controller mechanism to neutral position through the yellow linkage as heretofore described. [595]

Q. Will you similarly describe the construction and operation of the orange colored brake shown in the Carr drawings on Exhibit 70?

A. The orange brake is automatically applied whenever the reversing mechanism or controller mechanism is returned to neutral either manually or automatically.

Q. And in just a little more detail tell us how that happens in the operation of the Carr machine.

A. The yellow linkage mechanism which is actuated manually as well as automatically is fastened at its lowermost end to a brake actuating lever number 79. This lever has a cam which opens and closes the brake band at its respective positions to apply or release the brake.

Q. Now give us a brief general description of how this Carr carrier operates when it is employed to do its intended work.

A. The purple load lifting means is pushed under a load or a load is placed thereon. The operator then places brown operating handle number 86 into up position, thereby operating the control mechan-

(Testimony of Gustav A. Grab.)

ism in the box 69 and setting the power transmission means into motion to raise the load lifting means. When the load lifting means reaches its upper limit the roller 49 on the load lifting means contacts the red stop and thereby draws the power transmission means to neutral position and stops the lift. At the same time it automatically applies the orange brake. To lower a load the operation is the same in reverse. [596]

Q. (By Mr. Fryer): How do the yellow mechanisms of the Carr and Willamette elevators compare insofar as their respective functions are concerned?

A. They are substantially the same.

Q. What factors indicate such identity to you?

A. Both are means for transmitting the power from a source of power to the load lifting means, and both can be put into operative or inoperative position manually and into inoperative position automatically.

Q. In the Carr and in the Willamette elevators how do the functions of the red stop mechanisms compare with each other?

A. The function of the red mechanisms in the two structures is substantially the same.

Q. And will you likewise compare the respective functions of the orange-colored mechanisms in the Carr and in the Willamette elevators?

A. The function of the orange mechanism is also substantially the same in both structures.



(Testimony of Gustav A. Grab.)

Q. In view of the comparisons which you have made between the respective functions of the correspondingly colored elements in the Carr and Willamette elevators, will you state how the Carr and Willamette machines as a whole compare with respect to their construction, mode of operation and function? A. They are substantially identical.

Q. Will you state whether or not in the operation of the Carr machine the presence or absence of a load in the load lifting device in any way affects the operation of the mechanism?

A. No, it does not.

Q. In your experience in the carrier business have you ever seen in practical commercial operation elevators such as is shown in the Carr patent?

A. Yes, I have seen similar structures on numerous occasions handling materials, elevating them, carrying them from place to place, and including lumber. [597]

Q. Referring now to the Chart Respondents' Exhibit 25, will you state briefly what each of the various mechanisms on that chart is, and in making that explanation refer to the color of each mechanism you refer to.

A. The green-colored parts are the frame. The yellow-colored parts are the means for transmitting power from the source of power to the load lifting means. The purple parts are the load lifting means. The red parts are the means for automatically returning the power transmission means to neutral

(Testimony of Gustav A. Grab.)

position when the load lifting means reaches a predetermined position in either direction. The black color—I should like to correct my last statement. I do not see any red means on the drawings. I meant to refer to the black-colored structures in place of the red. The black-colored structure or structures are the means to return the power transmission means to neutral position when the load lifting means reaches a predetermined position in the up motion. The orange structure is the automatic brake means which is automatically applied whenever the power transmission means is returned to neutral automatically or manually.

Q. What is that large blue rectangular structure in Figure 1 of the chart Exhibit 25?

A. The blue structure is the load on the load lifting means.

Q. In the operation of the Gerlinger machine shown on the chart Exhibit 25 is it your understanding that upward movement of the load lifting means without a load, such as the blue load shown on the chart, will in any way affect the operation of the black bar 67?

A. A load like the blue load will strike the black part 67 on its up motion, lift this part 67, and thereby draw the power transmission means to neutral position.

Q. In the machine of the Gerlinger patent shown on the chart Exhibit 25 will such an operation as you have just described [598] occur if there is no

(Testimony of Gustav A. Grab.)

load in the machine but the load lifting means is started moving upwardly?

A. No, it will not occur.

Q. Upward movement of the load lifting means in the Gerlinger structure will or will not actuate the black bar 67 when no load is in the machine?

A. No, it will not.

Q. In the operation of the machine of the Gerlinger patent as shown on Exhibit 25 what will happen if the load instead of being of the dimensions shown in Figure 1 is a load, say, having only one-third the height of that load?

A. The power transmission means will continue to operate in the up motion until it is placed into neutral position manually or until the mechanism wrecks itself or kills the power by reaching a dead upper limit.

Q. Will you state whether or not you find in the drawings of the Gerlinger machine on Exhibit 25 automatic means for moving the clutch to neutral position upon movement of the load lifting means to a predetermined extent in upward direction?

A. No, I do not.

Q. What is it that indicates the absence of such a means in the Gerlinger drawings?

A. There is no means whatsoever shown. The only automatic means shown for stopping the upward motion is the black bar 67 which has to be contacted by the load, as plainly shown in Figure 1, to perform the function of stopping the lifting mechanism in the upward direction.

(Testimony of Gustav A. Grab.)

Q. Now, will you look at the photographs Respondents' Exhibits 44-A, -B and -C, showing the machine of the Gerlinger patent which was demonstrated to the Court, and state how the construction, mode of operation and function of the parts of the Gerlinger chart Exhibit 25 compare with that of the correspondingly colored parts on the photographs Exhibits 44-A, -B and -C? [599]

A. It is substantially the same.

Q. I notice that on the photographs Exhibits 44-A, -B and -C some of the parts are marked with dotted lines rather than solid black, and I ask you to state whether or not I am correct in assuming that those dotted black lines on the photographs are intended to correspond with the solid black portions shown on the chart Exhibit 25?

A. Yes, they are. They were colored in dotted lines on the photographs in place of solid black so as to not entirely cover the photographed parts and to still keep them so that they can be recognized.

Q. Is there any respect in which you find that the particular form of the various parts of the Gerlinger patent as shown on the chart Exhibit 25 varies from the mechanism as found in the Gerlinger machine demonstrated to the Court and shown in the photographs Exhibits 44-A, -B and -C?

A. It is substantially the same.

Q. Now, will you look at the photographs Exhibits 38-A, -B and -C, showing the defendant Clark & Wilson's Ross carrier, and state whether or not you find in that machine the combination of parts



(Testimony of Gustav A. Grab.)

described in the language on the chart Exhibit 25, insofar as the mere language of that writing is concerned?      A. Yes, I do.

Q. Will you state how the presence of those parts enumerated in printing on Exhibit 25 is indicated in defendant Clark & Wilson's Ross machine shown on the photographs Exhibits 38-A -B and -C?

A. Colors underlining the language are the same as colors which correspond—as colors and parts which correspond with the language.

Q. Now, will you state whether or not, in your opinion, from your understanding of defendant Clark & Wilson's Ross carrier, that machine has substantially the same mode of operation as [600] the machine shown in the Gerlinger patent?

A. It has not.

Q. Why not?

A. The Gerlinger structure as shown on the chart has a load-controlled stop only, while Clark & Wilson Willamette-Hyster structure has a lift-controlled stop.

Q. Will you state whether or not defendant Clark & Wilson's Ross carrier has the same or a different mode of operation from the mode of operation of the machine of the Gerlinger patent?

A. The Clark & Wilson's Ross carrier has a different mode of operation than the structure shown on the Gerlinger patent drawings.

Q. And what is the reason for that difference in mode of operation which you find, or what causes it?

(Testimony of Gustav A. Grab.)

A. The Clark & Wilson Ross carrier has a lift-controlled stop, which is absent in the Gerlinger structure, and, as shown by the drawings, the Gerlinger has a load-controlled stop only.

Q. As far as the mere language is concerned, will you state whether or not you find the combination of parts described in the language on the chart Exhibit 60 in the mechanism of the Dingee patent shown on that chart?      A. Yes, I do.

Q. How is the presence of that combination of parts described in the language on the chart Exhibit 60 indicated in the drawings of the Dingee patent shown on Exhibit 60?

A. Colors underlining the language are the same as corresponding charts colored the same on the drawing of the chart.

Q. Now, will you state whether or not the various mechanism as shown in color on the representations of the Willamette carrier in evidence are the use or appropriation of a combination of parts found in the Gerlinger patent, or whether such colored parts of the Willamette carrier are the use of a combination [601] of parts which you find, for instance, in the Dingee patent?

A. They are an appropriation of the parts as shown in the Dingee patent and not as shown in the Gerlinger patent.

Q. What makes you say that?

A. Both Willamette and Dingee have a lift-controlled stop, while Gerlinger has a load-controlled stop.

(Testimony of Gustav A. Grab.)

Q. Will you state whether or not the mode of operation of the colored parts in the Willamette carrier is the mode of operation found in the Dingee patent or the mode of operation found in the Gerlinger patent?

A. It is the mode of operation found in the Dingee patent and not in the Gerlinger patent.

Q. And the characteristic difference in the mode of operation which you refer to I assume has to do with the way in which the movement of the load lifting means is automatically controlled?

A. Yes.

Q. As far as the mere language is concerned, will you state whether or not the combination of parts described in the printing on the chart Exhibit 63 is found in the Nicholson mechanism shown on that chart?

A. Yes, it is.

Q. And in this case, also, is the presence of those enumerated parts in the printing on Exhibit 63 indicated by identity of colors?

A. Yes.

Q. Referring to the colored parts of the Willamette carrier as shown on the various exhibits here, will you state whether or not that combination of colored mechanisms of the Willamette carrier is an employment of a combination of parts found in the Gerlinger patent or an employment of a combination of parts found in the Nicholson patent? [602]

A. The combination of colored mechanisms in Willamette is an appropriation of Nicholson and not of Gerlinger.

(Testimony of Gustav A. Grab.)

Q. What are the factors which lead you to that conclusion?

A. The Gerlinger structure has a load-controlled stop only for automatically stopping the power transmission means in the up direction, while Willamette and Nicholson have a lift-controlled stop.

Q. Would you say, then, that the Willamette carrier employs the mode of operation of the Gerlinger patent or the mode of operation of the prior Nicholson patent?

A. Willamette employs the mode of operation of the prior Nicholson patent and not of the Gerlinger patent.

Q. Again referring to the mere language as it appears on the chart Exhibit 65, will you state whether or not the parts enumerated by that language are found in the French construction shown on the chart Exhibit 65?

A. Yes, they are.

Q. And again do we find that presence of those parts indicated by correspondence of colors between the mechanism and the wording on the chart?

A. Yes.

Q. In the representations of the Willamette carrier here in evidence would you say that the colored mechanisms on those representations of the Willamette carrier are an employment of a combination of parts found in the Gerlinger patent or an employment of a combination of parts found in the French patent?



(Testimony of Gustav A. Grab.)

A. The colored mechanisms on Willamette exhibits are an appropriation of the mechanisms as shown in the French patent and not of the ones shown in the Gerlinger patent.

Q. What features of construction in the machines referred to lead you to that conclusion?

A. The automatic means for arresting upward motion of the load [603] lifting means in the Gerlinger patent is a load-controlled stop, while in Willamette and French they are lift-controlled stops.

Q. Would you say, then, that the Willamette machine employs the mode of operation of the French patent or the mode of operation characteristic of the Gerlinger machine?

A. Willamette employs the mode of operation of the prior art French patent or machine, and not of the Gerlinger patent or machine.

Q. Looking now at the chart of the Towson patent, Exhibit 67, will you state whether or not as far as the mere language is concerned you find in the drawings of the Towson machine the various parts enumerated in the printed portion of that chart?

A. Yes, I do.

Q. And they also are indicated on this chart by identity of color?

A. Yes, they are.

Q. In the Willamette construction is it your opinion that we find a combination of parts such as disclosed in the Towson patent or the combination of parts found in the Gerlinger patent in suit?

(Testimony of Gustav A. Grab.)

A. I find the Towson construction in Willamette and not the Gerlinger construction.

Q. And what factors in the respective constructions of the machines indicate that conclusion to you?

A. Gerlinger has a load-controlled stop, while Towson and Willamette have a lift-controlled stop.

Q. Would you say, then, that Willamette employs the mode of operation of Towson or the mode of operation of Gerlinger?

A. Willamette employs the mode of operation of Towson and not of Gerlinger.

Q. Do you find on the chart Exhibit 70 of the Carr patent the combination of parts which are enumerated in the language [604] appearing on that chart, inasfar as the mere face meaning of the language is concerned?

A. Yes, I do.

Q. Will you state whether or not in your opinion the Willamette carrier in the parts shown in various colors on the exhibits in the record is an employment of the combination of parts found in the Carr patent or is an employment of the combination of parts found in the Gerlinger patent in suit?

A. Willamette has the parts and combination of Carr and not of Gerlinger.

Q. What is it in the Carr and Willamette structures which lead you to that conclusion?

A. Carr and Willamette have a lift-controlled stop, while Gerlinger has a load-controlled stop.

(Testimony of Gustav A. Grab.)

Q. And how, then, does the mode of operation of Carr and Willamette compare with the mode of operation of the Gerlinger machine?

A. Willamette and Carr are the same, but different than Gerlinger.

Q. In view of the various comparisons which you have now made between the colored combination of parts in the Willamette carrier and the various prior art structures, you may state whether or not in your opinion the colored parts of the Willamette carrier in evidence are an appropriation of prior art construction or whether they are the use of a combination found in the Gerlinger patent?

A. The colored combination shown on the Willamette structure and exhibits is clearly an appropriation of the prior art structures and not of Gerlinger.

Q. And, based upon the various comparisons which you have made, will you state whether or not in your opinion the mode of operation of the Willamette carrier is a mode of operation found in the prior art or a mode of operation peculiar to the [605] Gerlinger patent?

A. The mode of operation in Willamette is the same mode of operation as found in the prior art and not as found in Gerlinger.

Mr. Fryer: May I see Exhibit 47, if the Court please?

The Master: Certainly.

Mr. Fryer: I think we may save time and use 48 instead, if the Court please.

(Testimony of Gustav A. Grab.)

The Master: Beg your pardon?

Mr. Fryer: We will save time and use 48 instead, which is an enlarged view of the same structure.

The Master: All right.

Q. (By Mr. Fryer): You are the G. A. Grab on whose application patents 1838939 issued?

A. Yes.

Q. Will you state whether or not you ever built a machine having part 79 of that patent in it as shown on the chart Exhibit 48?

A. Yes, only experimentally.

Q. Will you state whether or not that mechanism like the bar 79 and connected instrumentalities was successful from an operating standpoint?

A. No, it was not.

Q. Will you state whether or not the defendant Willamette-Hyster Company at any time within six years prior to the bringing of this suit made or sold a machine containing in it a part having the construction or operation of the part 79 on Exhibit 48?

A. No, it has not.

Q. In other words, that member in that machine on Exhibit 48 which was designed to be engaged by the load in certain operations was never put into practical or commercial use by defendant Willamette-Hyster Company within six years prior to the filing of this suit, is that right? [606]

A. That is right.

Mr. Fryer: You may cross examine.



(Testimony of Gustav A. Grab.)

Cross Examination

By Mr. Geisler:

Q. You have worked in lumber yards, have you not?

A. I have worked in lumber yards for a few days to become acquainted with the operation of carriers.

Q. You have operated carriers in lumber yards?

A. Yes, I have, for the sake of becoming acquainted with the actual operation of the carrier.

Q. You operated them as a driver, as I understand it?

A. No, I did not. I operated them in the capacity of the man who built them and to gain some actual knowledge as to how to operate a carrier.

Q. At all events, you are familiar with the type of carriers used in a lumber yard?

A. Yes, I am.

Q. Is it not a fact that there are two distinct types used, one of a type similar to Defendants' Exhibit 41, which is generally referred to as a front-end-lift truck, and another one generally designated as a lumber carrier of the straddle type?

A. That is not quite true. We have one carrier which is a straight end-lift type, we have carriers which are straddle types only, and we have carriers which are a combination of straddle and end-lift carriers.

Q. But, now, the construction of the devices on an end-lift truck are quite different in purpose and

(Testimony of Gustav A. Grab.)

operation from those of the straddle type of lumber carrier?

A. No, they are not, in my opinion.

Q. I see. Would you use a lift truck, front-end-lift truck, for carrying a load of lumber from one point of a lumber yard to another?

A. Yes. In fact, we do so in various operations.

[607]

Q. Is it not a fact that the front-end-lift truck is used primarily for the purpose of tiering lumber? Do you know what I mean by tiering?

A. Yes, I do. It is one of the purposes, yes, but it is also used just—or, I believe, more extensively in just elevating lumber and carrying it from place to place in lumbering operations, particularly in box factories, in plants—or in other plants where particularly short lumber is used, such as furniture factories, battery separator plants, and so on.

Q. Well, I am not referring to any particular lumber yard. I am referring to a lumber yard such as, for instance, operated by the Clark & Wilson Company. Are you familiar with their operations?

A. Yes, I am.

Q. Now, then, the lift truck there is used largely for handling pieces of lumber which in length are much wider than the width of the carrier?

A. To my best knowledge the Clark & Wilson Lumber Company have no end-lift carrier, no combination end-lift and straddle carrier, at all.

Q. Well, have you seen a lift truck used in another lumber mill?

(Testimony of Gustav A. Grab.)

A. All along during my calls at the various mills, up until the time it took most of my time to prepare for this trial.

Q. Well, isn't it a fact that the——

The Master: I didn't get that. Read that question and answer.

(The question and answer referred to were thereupon read.)

Q. (By Mr. Geisler): Isn't it a fact that in some of the lumber mills which you saw the pieces of lumber carried by a lift truck were much longer than the width of the carriers, so that the ends projected beyond the sides of the carrier? [608]

A. That is right, with the exception of, as I stated heretofore, where they use a lot of short lumber, such as box shook, in which case the loads are approximately the width of the end-lift carrier or even shorter than the width of the end-lift carrier.

Q. Are you familiar with the use of a sorting table in a lumber yard?      A. Yes, I am.

Q. Now, the sorting table consists of an endless moving platform, on which the lumber is deposited in different sizes, is that right?

A. That is right.

Q. And there are attendants standing at both sides of this sorting table—right?

A. Yes, including the end of such a table.

Q. Now, in sorting, these attendants pull off the different size pieces of lumber from both sides of the sorting table and stack it in piles, is that correct?      A. Yes, that is correct.

(Testimony of Gustav A. Grab.)

Q. Now, what is the distance between those piles as stacked?

A. They vary as to the length, height and width.

Q. Now, that is not my question. What is the space between the stacks of adjacent lumber piles?

A. It is approximately the same between all the different piles.

Q. That is not my question. What is the distance—you understand the question, don't you?

A. Yes.

Mr. Fryer: We object to this line of examination, if the Court please. It has certainly nothing to do with anything this witness stated on direct. He did not testify about any lumber sorting tables or the size of the piles of lumber in sorting tables, or anything of that sort.

The Master: Overruled. [609]

A. If you want to ask me in this case, or if you want me to interpret this question——

Mr. Geisler: I ask your Honor to kindly direct the witness to give me an answer to that question.

The Master: Do you understand the question, Mr. Grab?

A. Not until I am allowed to make an explanation as to what the question actually is.

Mr. Fryer: I think it is evident the witness does not understand the question. I don't understand it, and I think he is entitled to have a proper question put to him, even though the examination has nothing to do with his direct testimony.



(Testimony of Gustav A. Grab.)

The Master: I think it has something to do with the direct examination. You may restate the question, Mr. Geisler.

Mr. Geisler: I will put the words "distance in feet", then, in the question.

The Master: Between these piles as they are stacked along the side of the sorting table?

Mr. Geisler: Yes, your Honor.

The Master: You understand that, don't you, Mr. Grab? A. Yes.

The Master: Will you answer the question?

A. They are a comparatively narrow space.

The Master: Approximately how many feet?

A. Approximately two feet.

Q. (By Mr. Geisler): Now, it would be impossible to get a lift truck into that space, would it not? A. No, it would not.

Q. Would it be possible to get—you couldn't get a lift truck into that space, could you?

A. You could not get an end-lift—a straight end-lift carrier into that space.

Q. The only way you could pick up these lumber piles would be by the use of a lumber carrier of the straddle type? [610]

A. No, not necessarily, because in this sorting chain operation, which is one of the numerous operations in a sawmill, in a great many cases these piles are picked up with an overhead hoist which is lowered from the top over the load and picked up in that manner and transported with an overhead system.

(Testimony of Gustav A. Grab.)

Q. Well, I haven't reference to any other system of moving lumber piles than just lumber carriers, what we are talking about. Now, to use a lumber carrier would you not have to use a lumber carrier of the straddle type to pick up those piles of lumber arranged on both sides—on either side of the sorting table?

A. No, I can't answer that question as yes, because the overhead system are also referred to as lumber carriers in the trade and among the operators.

Q. I am referring, then, to a wheel-mounted lumber carrier, just like the plaintiff's patent here in suit, and like the drawing of your patent shows.

A. Of course, a wheeled lumber carrier, if that is the only means of handling that particular lumber from the sorting chain, is the means for taking the piles away.

Q. Please look at that photo and state whether that does not show a customary arrangement of lumber piles in a lumber yard?

A. Yes, it does, if straddle type carriers are used only.

Q. The space in a lumber yard has to be economized as much as possible, is that not so?

Mr. Fryer: I don't believe that is cross examination, if your Honor please.

The Master: I think it is——

Mr. Fryer: He is not an expert on lumber yards. We object to it on that ground.

(Testimony of Gustav A. Grab.)

The Master: Well, perhaps not. If he doesn't know, why, he can answer it. I think the objection will be overruled. [611]

A. May I ask to have the question read, please?

(The question was thereupon read.)

A. Yes.

Mr. Geisler: I offer that as plaintiff's exhibit, whatever the next number is.

Mr. Fryer: We object to it on the ground it has not been authenticated, no proper foundation made, and it is not material or relevant to any issue in the case.

The Master: I think the witness has testified, as I recollect it, that this is illustrative of the way lumber is piled where straddle carriers are used. If I misunderstood him I would like to be corrected.

Mr. Fryer: I am quite sure there is no foundation for the photograph as a proper representation of anything.

The Master: The objection will be overruled. It will be received. It becomes 71.

(The photograph referred to was thereupon received in evidence and marked Complainant's Exhibit 71.)

Q. (By Mr. Geisler): Will you please look at this photo and state, Mr. Grab, whether that does or does not show common arrangement of lumber piles in a lumber yard?

A. Yes; where straddle type carriers are used only.

(Testimony of Gustav A. Grab.)

Mr. Geisler: I offer that in evidence as Plaintiff's Exhibit 72.

Mr. Fryer: We make the same objection, if your Honor please, upon the same grounds urged with respect to the photograph previously received.

The Master: The same ruling.

(The photograph referred to was thereupon received in evidence and marked Complainant's Exhibit 72.)

Q. Please examine this photo and state whether that does not [612] represent a common mode in which a lumber carrier of the straddle type is employed for picking up piles of lumber stacked along the sorting chain or table.

A. There is no sorting chain shown in this photograph. However, the loads apparently have been posed to be spaced approximately the same as they would ordinarily be spaced at a sorting chain.

Mr. Geisler: I offer that in evidence.

Mr. Fryer: We make the same objection, if the Court please.

The Master: The same ruling.

(The photograph referred to was thereupon received in evidence and marked Complainant's Exhibit 73.)

Q. (By Mr. Geisler): Will you please look at this photograph and state if that does not show the usual operation of the lumber carrier of the straddle type in picking up a stack of lumber piled on either side or one side of a sorting chain?



(Testimony of Gustav A. Grab.)

A. Yes, it does.

Mr. Geisler: I offer that in evidence, if your Honor please.

(The photograph referred to was thereupon received in evidence and marked Complainant's Exhibit 74.)

Q. (By Mr. Geisler): I will ask you to please look at this photo and state if that does not also illustrate the use of a straddle type lumber carrier for picking up a pile of lumber arranged alongside of a sorting chain.

A. Yes, it does.

Mr. Geisler: I offer that in evidence, if your Honor please.

The Master: Complainant's Exhibit 75. It will be received.

(The photograph referred to was thereupon received in evidence and marked Complainant's Exhibit 75.)

Q. (By Mr. Geisler): Now as I understand, the defendant's lift truck, as shown in the Defendants' Exhibit 41—if the witness will kindly be shown Exhibit 41.

The Master: Is that the circular? [613]

Mr. Geisler: It is the circular.

Q. (Continuing): —is the same kind of wheeled mounted hoist as is shown, for example, in the Carr patent that you referred to?

A. Yes, it is a similar structure as the one shown in the Carr patent.

(Testimony of Gustav A. Grab.)

Q. A front end or lift truck, such as shown by Defendants' Exhibit 41, can pick up lumber only, a pile of lumber only from the side of the pile; is that right? A. No, that is not right.

Q. You would pick up by means of that truck a pile of lumber by trying to insert the front end lift portion under the end of the pile? A. Oh, yes.

Q. How would you hold it in place? How would you hold the pile in place on those arms that carry the lumber?

A. If the length of the load is not a great deal greater than its width it doesn't matter whether the load is picked up from the side or the end, and in the operations I have seen I believe that the loads are picked up from the end by the lift truck just as much as they are from the side.

Q. Now a lift truck has but two arms which are spaced a considerable distance apart; is that correct? A. No, that is not correct.

Q. Will you please look at Defendants' Exhibit 41; that is the kind of a lift truck that I am referring to. Now has not that only two arms which project from the front end of the hoisting devices and serve to carry the load? A. This——

Mr. Geisler: No. Please answer my question; then you can explain.

A. Yes. The photograph shown in this exhibit shows arms only. However, it is common practice, and we have used platforms in place of arms only if the customer desires to use a platform. [614]

(Testimony of Gustav A. Grab.)

Q. When you use arms only, then the only way the lift truck would pick up a load would be from the side; is that right? A. No, it would not.

Q. Well, how would you pick up—look at Defendants' Exhibit 41 and imagine that that, or let us suppose that that pile of lumber is placed on bolsters and we are going to pick up that pile of lumber from the end on the two arms of this lift truck spaced apart as shown in Exhibit 41, how would you do it?

Mr. Fryer: May I have that question read, please?

(Last question read.)

A. It is a well known fact that loads of lumber that are to be handled by any kind of a lumber carrier, whether it is end lift or the straddle type, the loads are always placed on convenient platforms or bolsters. If I would choose to pick this particular load up from the end I would pick up the bolsters with it, the same as I would have to do on a straddle type carrier.

Q. You couldn't carry the pile of lumber, though, by picking it up from the end in the same way as carried there, or shown to be carried, by the lift truck in Defendants' Exhibit 41?

A. No, I could not. And, furthermore, it could not be done with a straddle type carrier.

Q. (By Mr. Geisler): Mr. Grab, could you handle all types of loads as in an ordinary lumber yard either from the side or the end with a lift truck alone? A. No.

(Testimony of Gustav A. Grab.)

The Master: When you speak of a lift truck, what do you refer to?

Mr. Geisler: Your Honor, a lift truck is that one——

The Master: You mean a front end lift?

Mr. Geisler: Front end lift.

The Master: Oh.

Mr. Geisler: They have so designated it on 41.  
[615]

The Master: I see; just so we will know.

Mr. Geisler: Yes, sir.

Q. Could you operate a front end lift truck in connection with a sorting chain, such as shown in the photographs I referred you to a few minutes ago?

A. No, not with the particular type of sorting chain shown.

Q. Referring to the back of the circular. Defendants' Exhibit 41 and the lower figure shown in outline, having particular reference to those arms on which the load is to be carried, now if the length of the sticks of lumber that you were going to pick up were in excess of twice the length of those arms you couldn't pick them up, could you? A. No.

Q. Are these front end lift trucks used in the lumber yards as a substitute for lumber carriers?

The Witness: I didn't quite get all the question.

Q. Are these front end lift trucks used as a substitute in lumber yards for straddle type of lumber carriers? A. Yes.



(Testimony of Gustav A. Grab.)

Q. Where the lumber yard uses a sorting chain?

A. No.

Q. What is the approximate speed of the straddle type of lumber carrier?

A. About ten miles per hour.

Q. Is that in the yard, lumber yard, or on the road?

A. In a yard.

Q. When you use them on the road of course they would have much greater speed?

A. No; that is the maximum speed.

Q. Of the straddle type of lumber carriers?

A. Of end lift carriers.

Q. No; I was referring, Mr. Grab, to straddle type of lumber carriers. [616]

A. Oh, I beg your pardon. I didn't understand your question quite right then. Straddle type carriers have a high road speed of approximately as great as fifty miles per hour and the ordinary operating speed in the yard I should say is about twelve to sixteen or eighteen miles per hour.

The Master: Pardon me; is that maximum speed fifty?

The Witness: Fifty, your Honor.

Mr. Fryer: How do you spell it?

The Master: F-i-f-t-y.

Q. (By Mr. Geisler): When a load is to be moved from one end of a yard to another end of the yard, we will say, it is customary to employ a straddle type of lumber carrier?

A. If they have a straddle type carrier and if the distances are great, yes.

(Testimony of Gustav A. Grab.)

Q. Now what is the speed at which a truck lift carrier is operated?

A. An end lift carrier is operated at the advertised speeds of up to ten miles per hour.

Q. The speed at which that is run would depend upon the condition of the flooring of the lumber yard when the front end truck, lift truck, is operated in the yard?

A. Yes, that is right.

Q. Because if the lumber were piled crosswise of a carrier as shown in Defendants' Exhibit 41, if the front end lift truck were run at too great a speed, why, the load would be jostled off, thrown off; is that right?

A. Yes, that is right.

Q. Could a lumber carrier of a front end truck type as shown by Defendants' Exhibit 41 handle as much lumber during a day's operation as a straddle type of lumber carrier, and such as described by the plaintiff's patent in suit and shown by your patent in evidence here?

A. Yes, it could. [617]

Q. Did you understand my question?

A. Yes, Mr. Geisler.

Q. That a lift truck could handle just as much lumber as a straddle type of truck?

A. Yes.

Q. Does that relate to mills which employ sorting chains?

A. No.

Q. Would you recommend the use of a front end lift truck as a substitute for straddle type of lumber carrier in a lumber yard?

A. Yes.

Q. If you had but one carrier to use, or if the lumber yard were going to buy but one lumber carrier?

A. Yes.

(Testimony of Gustav A. Grab.)

Q. Now supposing that lumber yard had a sorting chain, would you then recommend the use of a front and lift truck as a substitute, and exclusively, for a lumber carrier of the straddle type?

A. No, I would not.

Q. Now, I call your attention to the Dingee patent, Defendants' Exhibit 59. I haven't any copy of it. I will ask that I may have the exhibit, if it is here.

The Master: It is 59, I think.

The Witness: I have it, your Honor.

Mr. Geisler: I would like to see it.

Q. The Dingee patent No. 414,380 is dated November 5th, 1889. Now that patent illustrates and describes merely an elevator; isn't that right?

A. Yes.

Q. There is no suggestion in that patent of any kind as to the conversion of this elevator into a straddle type of lumber carrier?

A. No, there is not.

Q. The only reason you find for comparing this Dingee patent with the patent in suit is because it embodies mechanism for [618] controlling, or raising and lowering of the lift, and I believe also has a brake; is that right?

A. No.

Q. It has no brake?

A. Oh, yes, it has a brake.

Mr. Geisler: Well, now then, please answer. Will the reporter kindly read my question over; then I would like an answer.

(Testimony of Gustav A. Grab.)

Mr. Fryer: I suggest, if your Honor please, that a proper question should be put. The witness has answered every question asked of him so far.

The Master: His answer was "no".

Mr. Geisler: I see.

Q. In what respect, then, do you consider that this Dingee patent has any bearing on the patent in suit?

A. The Dingee patent has the entire combination as literally described in claim 4 of the patent in suit.

Q. Isn't it a fact that the reason you find a similarity in the Dingee patent and the patent in suit is because the Dingee patent shows mechanism for raising, limiting the raising and lowering of the elevator? That is one of the reasons?

A. Yes, that is one of the reasons.

Q. And the Dingee patent shows also a brake which is applied in cooperation with the means for limiting the raising and lowering of the elevator automatically?

A. Yes, it shows such a brake.

Q. Now what other features do you find in that Dingee patent that are suggestive of the plaintiff's patent?

A. I find the entire combination as described by claim 4.

Q. That is a conclusion. I would like you to point out specifically what parts, referring to the



(Testimony of Gustav A. Grab.)

drawing of the Dingee patent and the specification, which you believe to be like the combination of the claim in suit.

A. I find a green frame; I find a purple load lifting means; I [619] find a yellow means for transmitting motion from a source of power to the load lifting means comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction; I find a brown means——

Q. Now just a moment, Mr. Grab. You are reading from a paper before you. What is that paper?

A. It is a copy of claim 4.

Q. I didn't ask you to read claim 4. I asked you to please point out specifically, without any reference to claim 4 specifically in the Dingee patent the parts which are shown in the drawing and the description thereof in the specification which in your opinion you believe to be similar to the patent in suit. Now will you please close up that legend before you.

Mr. Fryer: I submit, if your Honor please, that the witness should be permitted to have the Dingee patent before him.

Mr. Geisler: Oh, yes; I have no objection to that.

The Master: He may have the Dingee patent before him.

(Testimony of Gustav A. Grab.)

Mr. Fryer: What he had was Exhibit 60, a copy of the Dingee drawings. Now if he may not have Exhibit 60 I suggest that he have a copy of the Dingee patent.

Mr. Geisler: Certainly.

The Master: That he is entitled to.

Mr. Geisler: I thought he had it before.

Mr. Fryer: He did, but you didn't want him to look at it.

Mr. Geisler: No; I don't want him to look at the stereotyped information.

The Master: That was 61.

Mr. Fryer: 60 is the chart of the Dingee drawings, your Honor.

Mr. Geisler: 59, your Honor. I have withdrawn this. I have the only copy here.

Mr. Fryer: The witness has a copy of 59 in his book before him.

The Master: Have you got the patent itself?

[620]

The Witness: Yes, your Honor.

The Master: Refer to that.

The Witness: Yes, your Honor. May I ask an explanatory question?

The Master: Yes.

The Witness: Am I asked to compare the Dingee patent or structure with claim 4 of the patent in suit?

Mr. Geisler: No, your Honor, that was not my question. I want him to point out in the Dingee

(Testimony of Gustav A. Grab.)

patent, by reference to its drawings and specification, those parts which he believes are similar to the combination of the patent in suit, but not with reference to the elements; I mean to the structural features of the patent in suit.

The Witness: I am ready to answer the question.

The Master: Very well; proceed.

A. The Dingee patent and drawing shows a frame, a load lifting means mounted therein, a means for transmitting power from a source of power to the——

Mr. Geisler: Excuse me. I don't want it that way. I wish you would kindly refer to the drawings by number and to the specification by reference character, so we can follow what you are talking about.

The Witness: Oh, yes; I beg your pardon. The Dingee patent shown a frame consisting of parts capital B-1.

Q. What sheet please? Pardon me: What figure, please, I mean?

A. On Figure 2 of parts in Figure 1 which clearly indicate—of other parts in Figure 1 which clearly indicate the frame structure but are not numbered. The Dingee patent also shows a load lifting means number capital A-1. It also shows a means for transmitting power from a source of power to the load lifting means, consisting princi-

(Testimony of Gustav A. Grab.)

pally of parts small c-1, small b-2, Capital B, small c-1, small c-2, small d-1, small d. It also has means to place this load lifting—this power [621] transmission means into operative or inoperative position manually, consisting of parts capital F in Figure 1.

Q. What figure, please?

A. In Figure 1.

Q. I see. What is that part, capital F?

A. It is an endless cable.

Q. Proceed, please.

A. Further, this manual means for placing the power transmission means in operative position manually or automatically on Figure 2, lugs small f-2, on this endless cable capital F in Figure 1, this cable passing through operating lever capital E-4 on Figure 2, the endless cable and this lever operating clutch operating shaft E-4 capital E, rather, in Figure 2. The Dingee structure also has automatic means for returning the power transmission means to neutral position, consisting of, referring to Figure 1, stop lever arm small a-1 and stops capital F-1 fastened to the endless cable capital F. The Dingee patent also has an automatic brake shown in Figure 1 consisting of small e-4 mounted on the eccentric small e-1, which in turn is fastened to the clutch operating shaft capital E.

Q. Well, summing up all that you have said, the devices which you describe, putting it in con-



(Testimony of Gustav A. Grab.)

crete form, is a description of nothing more than a means for controlling a hoist with regard to its raising and lowering and stopping means for that purpose, and applying a brake to the device at the moment it stopped; is that correct?

The Witness: I didn't follow the entire question, if you please.

The Master: Read the question.

(Last question read.)

A. No.

Q. (By Mr. Geisler) Why is it not?

A. It is a description of an entire combination of a hoist, [622] including the various mechanisms and parts you describe.

Q. It is a description of a hoist in which the raising and lowering of the load carrying part is controlled by automatic stops? A. Yes.

Q. And has a brake element which is applied when those automatic stops are thrown into action? A. Yes.

Q. Now this is an elevator, as we all understand?

Mr. Fryer: That has been asked and answered once before, and we object to it on that ground.

The Master: Proceed.

Q. (By Mr. Geisler) Now you told us that you would have no difficulty in converting this Dingee patent into a straddle type of lumber carrier, did you not?

(Testimony of Gustav A. Grab.)

A. I don't recall saying that.

Q. Well, would you have any difficulty in converting this Dingee elevator construction or incorporating it into a lumber carrier? A. No.

Q. Now what would you do in order to place this Dingee lift control into a lumber carrier of the straddle type? Just proceed as you would if you were designing it. What would you do?

A. I would simply mount a mechanism of substantially the same construction, with minor modifications in the form, on a wheeled truck.

Q. I am not talking about a wheeled truck, Mr. Grab; I am talking about a straddle type of lumber carrier.

Mr. Fryer: May I have the last question read, if your Honor please, preceding this one?

The Master: Read it, please.

(The question was read as follows: "Now what would you do in order to place the Dingee lift control into a lumber carrier of the straddle type? Just proceed as you would if you were designing it. What would you do?") [623]

Mr. Fryer: Now may I have the answer?

(Last answer read.)

Mr. Fryer: We object to the last answer, if your Honor please, on the ground that it is repetitious and misleading. I mean the question.

Mr. Geisler: Now please read my last question.

(Testimony of Gustav A. Grab.)

The Master: Read the last question.

(The last question was read as follows: "I am not talking about a wheeled truck, Mr. Grab; I am talking about a straddle type of lumber carrier.")

The Master: Well, that is not a question.

Mr. Fryer: That is why I object to it. It is a statement and it is misleading to the witness. I think the witness has answered the last question that was addressed to him, and the last statement was——

The Master: He may have done that, but counsel has interjected an explanation; he has not asked a substantive question.

Mr. Geisler: I see the point.

The Master: So if you incorporate what you have in mind in a question, then we will proceed.

Mr. Geisler: Yes, your Honor. Correct. If the reporter would kindly read over the question, the original question which the witness answered, I would ask him to do that?

(The question referred to was read as follows: "Now what would you do in order to place the Dingee lift control into a lumber carrier of the straddle type? Just proceed as you would if you were designing it. What would you do?")

(Testimony of Gustav A. Grab.)

Mr. Geisler: Please remember we are talking about a straddle type of lumber carrier, not about a mere truck, wheeled truck.

The Master: You desire him to answer the previous question, bearing in mind that you are talking about a straddle type lumber carrier?

Mr. Geisler: Yes, your Honor. [624]

The Master: Now will you kindly do that, Mr. Grab.

A. For a straddle type carrier a particular type truck of the straddle type would be necessary to mount this combination into.

Q. (By Mr. Geisler) Then if you had such particular type of straddle carrier, you would have to place these control elements into that, would you not—lift control elements?

A. Yes, on to its frame.

Q. You would have to arrange the parts which make up the lift control elements and the brake, rearrange them, I mean, so that you could incorporate them in a straddle type of lumber carrier?

A. I would have to rearrange them as far as form is concerned, but not as far as mode of operation or function are concerned.

Q. Now if you did not have a straddle type of lumber carrier in mind, would the Dingee patent suggest to you the building of a straddle type of lumber carrier with automatic stops as you mentioned? Automatic controls, I meant to say.



(Testimony of Gustav A. Grab.)

A. No, it would not suggest a straddle type carrier but it would suggest a lumber carrier.

Q. You mean it would suggest a truck of some kind with hoisting mechanism and controls for the hoisting mechanism?

A. Yes; it would suggest a truck which would elevate and carry lumber or other materials.

Q. Now I call your attention to the Nicholson patent, Defendants' Exhibit 62. I am going to ask you to have reference to the patent only, Mr. Grab. A. Yes.

Q. This is patent No. 1,340,458 and dated May 18th, 1920. This is a portable hoisting device, broadly putting it, is it not? A. Yes.

Q. The hoist mechanism can perform two operations, one in which the load lifting device is merely lifted vertically and another operation, which is option, I assume from the drawing, it may be tilted? [625] A. Yes.

Q. Is that correct? A. Yes.

Q. Now referring to the operation which concerns the mere raising and lowering of the platform 4, I believe it is designated in Figure 1, there are means provided for raising and lowering this platform vertically; is that correct? A. Yes.

Q. And there are means provided which limit the raising and lowering operation to two predetermined points; is that correct? A. Yes.

(Testimony of Gustav A. Grab.)

Q. And there are means provided for applying a brake, I believe. Also, when the stopping automatic stops are thrown into action? A. Yes.

Q. Now let us compare with that the Defendants' Exhibit 41, which shows on the circular. You have it there, Mr. Grab? A. I have it here.

Q. The lift truck. The devices which I refer to in the Nicholson patent with regard to the raising and lowering of the load vertically and the means for controlling this lifting mechanism are the same as are shown, or the same, I should say, as are employed in the defendant's lift truck, Exhibit 41; isn't that correct?

A. Yes, substantially the same.

Q. Is there anything suggestive in this Nicholson patent with regard to the incorporation of the lift controlling devices into a lumber truck?

A. Yes.

Q. That is, if you had a lumber truck in mind?

A. Not necessarily, no.

Q. If you do not have a lumber truck in mind, would this Nicholson patent suggest to you the building of a straddle type of lumber carrier with lift controls? [626]

A. No, not of a straddle type, at first glance.

Q. All it suggests is merely a lift truck; is that correct?

A. Yes, a lift truck or a material carrier.

(Testimony of Gustav A. Grab.)

Q. In order to incorporate the mechanism shown in the Nicholson patent into a lumber carrier of the straddle type, it would be necessary for you to rearrange the parts of the lift control as shown—the parts suggested in the Nicholson lift control; is that right?

A. Yes, only as far as the form is concerned, but not as to mode of operation or function.

### GUSTAV A. GRAB

thereupon resumed the witness stand, and was examined and testified further as follows:

#### Cross Examination

resumed:

Q. (By Mr. Geisler) Going back a moment, Mr. Grab, to the differences in the lift truck, front-end-lift truck, such as manufactured by the defendant, and the straddle type of lumber carrier, is it not a fact that in loading a front-end-lift truck you would have to centralize the load?

A. I didn't get the last three words, Mr. Geisler.

Q. Centralize the load.                      A. Yes.

Q. Kind of balance it up.

A. Yes, in a way.

Q. That is not a condition imposed upon the use of a straddle type of lumber carrier, is that right?

(Testimony of Gustav A. Grab.)

A. Yes. Yes, it is in a way, as well.

Q. Well, ordinarily, because you pick up the load at four points, or at least by the lifting shoes, very little centralization or very little balancing of the load is required, isn't that right?

A. Very little is required. However, some is required, yes.

Q. Now, referring to the French and Pavey patent, number 1360917, [627] dated November 30, 1920, being Defendants' Exhibit 64—Have you a copy of that before you?

A. Yes, I have.

Q. —that is another example of wheel-mounted hoist, is it not?

A. Yes, it is another example of an end-mounted lifting device.

Q. When you say end-mounted you mean the carrier member projects from one end of the vehicle?

A. Yes.

Q. The reason you believe that this patent has bearing on the patent in suit is that it contains means, including a brake, for controlling automatically the raising and lowering of the lifting element, is that right?

A. Yes, it includes the entire combination described in claim 4 of the patent in suit.

Q. Does this patent suggest the building of a lumber carrier?

A. Yes, it would if I—



(Testimony of Gustav A. Grab.)

Q. I mean of this straddle type here——

Mr. Fryer: I suggest, if your Honor please, that the witness be permitted to complete his answer before being interrupted with another question.

The Master: Well, I think counsel was modifying the question.

Mr. Geisler: That is all.

Mr. Fryer: Well, may we have the answer as far as it went, then?

The Master: Oh, yes, whatever he said.

Mr. Fryer: I would like to hear it, I mean, if I may.

The Master: Oh, yes.

The Reporter (reading): “Does this patent suggest the building of a lumber carrier?”

“A. Yes, it would if I——”

Mr. Fryer: May I suggest that that answer be completed before interrupting?

Mr. Geisler: Go ahead.

The Master: Go ahead. [628]

A. Yes, it would if I had the building of a lumber carrier in mind.

Q. (By Mr. Geisler) If you did not have the building of a lumber carrier in mind would it then suggest such a lumber carrier and the inclusion of such lift-controlled elements in a straddle type of lumber carrier?      A. If I——

Q. ——did not.

(Testimony of Gustav A. Grab.)

A. No, if I did not have in mind building anything it naturally would not suggest anything to me.

Q. So that patent does suggest, does it not, the building of a lumber truck with an end lift of the French and Pavey patent?

A. No, not entirely.

Q. What do you mean by "not entirely"?

A. If I had in mind building a lumber carrier it would suggest the building of any type I might have in mind.

Q. But it would not specifically suggest the building of a lumber carrier?

A. If—No, unless I had the building of a lumber carrier in mind.

Q. I now refer you to the Towson and Cochran patent number 1337804, patented April 20, 1920, being Defendants' Exhibit 66.

A. I have it before me.

Q. Thank you. That also suggests mechanism for raising a load, is that right? A. Yes.

Q. The raising of a load as shown in this particular patent is only to a small extent, very few feet, apparently, is that right?

A. That is right.

Q. The reason you believe that this particular patent has bearing on the plaintiff's patent in suit is again because it includes means for controlling automatically the raising and [629] lowering of

(Testimony of Gustav A. Grab.)

the lifting, element in this patent, also including a brake, is that right?

A. Yes, it has the entire combination described in the claim of the patent in suit.

Q. When you mentioned the entire combination, as you put it, you have reference to the means shown in the plaintiff's patent for limiting the raising and lowering of the lifting devices, load lifting devices, by automatic stops and also a brake which is applied when those stops are thrown into action, is that right?

A. Yes, those features, together with the other parts of the combination described in the claim.

Q. Now, what other parts have you reference to, Mr. Grab?

A. A frame and a load lifting means mounted therein, and means to manually place the load lifting—or the power transmission means into operative and inoperative position.

Q. Anything else?

A. I would have to have the question again to know if I have missed any in my last answer.

Mr. Geisler: All right.

The Master: Read the preceding question.

(The last three questions and the answers thereto were thereupon read.)

A. No, that is all. I think that is the entire combination mentioned in that claim.

Q. You what?

(Testimony of Gustav A. Grab.)

A. To my best recollection that is the entire combination mentioned in claim 4.

Q. I did not ask you about claim 4. I wanted to know from you what parts you find in the Towson and Cochran patent which have any bearing on the plaintiff's patent, the structure shown in the plaintiff's patent?

A. May I ask if you want me to describe the particular parts, Mr. Geisler, by number and name?

[630]

Q. Yes, if you want to go into the details, I would like to get your statement about this patent.

Mr. Fryer: We suggest, then, if that is the purpose of the examination, the witness be allowed to refer to the plaintiff's patent in suit, which he is now asked to compare with this prior Towson patent.

Mr. Geisler: Most assuredly.

Mr. Fryer: Then we request that the witness in making his answer compare the plaintiff's patent in suit, Exhibit 2, with the Towson patent.

Mr. Geisler: No objection.

Mr. Fryer: Have you a copy of each of the patents with you, Mr. Grab?

A. Yes, I have.

Mr. Fryer: Very well.

A. The Towson patent describes an industrial truck or material carrier capable of elevating and



(Testimony of Gustav A. Grab.)

transporting materials. It consists of a wheeled frame, some of which are parts number 10 and number 13, in which a load lifting means is mounted consisting of parts number 20, 30, 31, 35, 41, 34, 41, 37, 21, and some other minor parts which are parts of the general load lifting means. It also has means for transmitting power from a source of power, the source of power in this case on the Towson patent being an electric motor number 67, shown plainly in Figure 5. The means for transmitting motion are a reversing mechanism shown in Figure 6, consisting mainly of parts 80, 83, 81 and 82. This reversing mechanism is of such nature as to put the power transmission means into raising or lowering position as well as into neutral position. The power transmission means consists mainly of parts 47, 48, 61, 60 and 67. This Towson device also shows means for manually engaging the power transmission means, as well as to disengage the same. These means are shown as parts number 87 and 86 in Figure No. 1. The [631] Towson patent also shows automatic means for stopping the load lifting means, or power transmission means, rather, whenever the load lifting means reaches a predetermined position. These automatic stop means are shown in Figure 6, consisting mainly of parts 91, 92, 93, 94, 95, 96 and 97. The device also shows an automatic brake mechanism shown and described as part 100 on Figure 5 of the patent.

(Testimony of Gustav A. Grab.)

Q. (By Mr. Geisler) Does this Towson and Cochran patent suggest the building of a straddle type of lumber carrier?

A. Yes, if I had the building of a straddle type lumber carrier in mind it would.

Q. If you did not have that in mind, would it?

A. It would not, because if I did not have anything in mind it could not suggest anything to me.

Q. Now, referring to the Carr patent, Defendants' Exhibit 69——

A. I have it before me, Mr. Geisler.

Q. Thank you. That is 1407024, patented February 21, 1922.

A. I have it before me.

Q. This patent also shows a wheel-mounted hoisting device, does it not? A. Yes.

Q. And it includes means for limiting the raising and lowering of the load carrying element and for applying a brake when the limitations have been reached, does it not? A. Yes.

Q. Taking all these patents which we have referred to, Dingee, Defendants' Exhibit 59, Nicholson, Defendants' Exhibit 62, French and Pavey, Defendants' 64, Towson and Cochran, Defendants' 66, and Carr, Defendants' 69, all of them show examples of wheel-mounted hoists and are substantially alike in principle of operation?

A. Yes.

(Testimony of Gustav A. Grab.)

Q. None of them would suggest the building of a lumber carrier [632] if you did not have a lumber carrier in mind, is that right? A. No.

Q. If you did not have a lumber carrier in mind would they suggest the building of a lumber carrier? A. No.

Q. All they might suggest to you would be the building of some kind of a truck for lifting a load, regardless of what is to be lifted, is that right?

A. Yes, if I had the building of such a truck in mind.

Q. You are familiar with the classification of lumber carriers, lumber trucks, as put out by the defendant Willamette-Hyster, are you not?

A. I am afraid I don't quite understand the question.

The Master: Read the question.

(The question was thereupon read.)

A. May I ask if you mean the word, the meaning of the word, or classification by any certain patent or patents?

Q. (By Mr. Geisler) No, what I mean is, are there not two general types of lumber carriers, the one being specifically known as the straddle type and the other as the lift truck type? A. No.

Q. Are you familiar with the advertising of the lumber carriers put out by the defendant Willamette-Hyster Company?

A. Yes, I am.

(Testimony of Gustav A. Grab.)

Q. You have anything with the forming or the framing of the advertising to do—suggestions in regard to it?      A. Yes, I do.

Q. Now I show you here the October issue, 1936, of *The Timberman*, the back of that magazine. Now on the lower right hand corner is one type of carrier, which is of the straddle type, is it not?

A. Yes.

Q. The picture show there is? [633]

A. Yes.

Q. Isn't that known to the trade by the name straddle type, or words to that effect, as shown on that advertisement?

A. Yes. It is also known as just a plain carrier or lumber carrier.

Q. As advertised on the back of that particular magazine, however, the word "straddle" or "straddling" is specifically associated with that cut, is it not?      A. It is not.

Q. It appears right over that cut, does it not?

A. Yes, but underneath and alongside of other cuts as well.

Q. Now on the upper left hand corner of the back of that magazine is pictured the end lift truck; is that right?      A. Yes.

Q. An end lift truck, as far as the products of defendant Willamette-Hyster Company are concerned, always designates lift trucks substantially as shown by Defendants' Exhibit 41? That is that circular I have reference to?      A. No.



(Testimony of Gustav A. Grab.)

Q. You have other types of end lift trucks manufactured by the defendant, too? A. Yes.

Q. Have you got samples of them here?

A. Yes, we have. We have our regular advertising matter on Willamette Utility Carriers, a copy of which I have here.

Q. Would you turn to the first inside page, turning over the cover, and I will ask you to read what it states on that inside page?

A. Speed, power, quality. Pneumatic or solid tires. Gasoline or full Diesel power plants.

Q. What does it give a picture of underneath that statement?

A. It gives a picture of Willamette Utility Carrier.

Q. Of what type? Of straddle type? [634]

A. Of the straddle type.

Q. What does it say underneath that?

A. "America's Finest Straddle Truck, Willamette Utility Carrier. 50 miles per hour. Four wheel steering. Four wheel hydraulic brakes. Same speeds forward and reverse. For transporting and high piling. The self-loading and self-unloading straddle type truck for carrying lumber, pulp, paper, pipe, steel, brick, tile. Any material! Any length! Anywhere! Willamette-Hyster Company, Portland, Oregon."

Mr. Fryer: We now offer in evidence, if your Honor please, the advertising material produced by

(Testimony of Gustav A. Grab.)

the witness and ask that it be marked Respondents' Exhibit 76.

Mr. Geisler: Are you introducing it?

Mr. Fryer: Yes.

Mr. Geisler: I was going to save you the trouble. However, either way; it is immaterial.

The Master: It will become Respondents' Exhibit 76.

Mr. Geisler: May I compare that one, your Honor, with the one I have here?

The Master: Yes.

Mr. Geisler: To make the thing more specific, I am offering on behalf of the plaintiff only the first sheet of that particular circular or book, not being familiar with the rest of it.

The Master: You may change your legend on that. Sheet 1 of this book will be marked Complainant's Exhibit 76, and if at the proper time the respondent desires to offer any remaining part of it it may.

(The sheet so offered, being first inside sheet of book entitled "America's Finest Straddle-Truck" of the Willamette-Hyster Company was thereupon received in evidence and marked Complainant's Exhibit 76.)

Q. (By Mr. Geisler) Referring to your patent, Mr. Grab, Plaintiff's [635] Exhibit 47, lifting mechanism entitled "Lifting Mechanism for Traversing Hoists", will you kindly tell me what that

(Testimony of Gustav A. Grab.)

phrase or expression "for traversing hoists" means?

The Witness: May I see a copy of the patent, please?

(Exhibit 47 passed to the witness.)

The Witness: May I hear the question again, please? I have the exhibit now.

(Last question read.)

A. Traversing hoist means an elevator which traverses the ground or the earth, I guess, which travels on the ground.

Q. (By Mr. Geisler) The invention as a whole, however, was directed specifically to a lumber carrier of the saddle type; is that right?

Mr. Fryer: I don't know what this is cross examination of, your Honor. We object to it on this ground. This man has not been asked about the invention of any patent, particularly of this patent.

Mr. Geisler: Both parties have been examining this witness with regard to that patent before. It is in the case, your Honor. It is specifically involved here, as will appear very shortly, because I will bring it out, as will appear by the witness' evidence, it is not the direct type of lift control which is employed by the Willamette-Hyster, defendant, in the manufacture of its truck.

Mr. Fryer: On direct examination of this witness, if your Honor please, there was only one ques-

(Testimony of Gustav A. Grab.)

tion addressed to this witness that has any bearing whatsoever upon counsel's remarks. I asked him whether or not his company had ever made a machine containing in it a part like the part 79 on Exhibit 48, and the witness stated that his company experimentally had once made a machine with a part like that in it but in effect that they had never manufactured a machine having that construction or operation. Now that examination was not with respect to a patent but with [636] respect to a machine, and the reference to this chart and not the patent was merely to identify the part of the machine about which I was interrogating the witness. I asked him, "Did your company ever make a machine containing that part in it?" And he said, "Once experimentally and we abandoned it." Now that is all there is in the direct evidence of this witness bearing upon this subject in any way. He has not been interrogated about this patent, and we submit it is not cross examination and not germane to any issue in the case. In that respect we reserve leave, at a later time, to quote authorities to your Honor on that proposition.

Mr. Geisler: If the court please, it will appear that the witness here, Mr. Grab, is the manager of the department of the defendant with regard to the building of lumber carriers, and it will appear that this lumber carrier, for which he obtained a patent, is directly germane to that particular ques-



(Testimony of Gustav A. Grab.)

tion. In fact, he built it under the instructions of the defendant. It is a very important piece of evidence.

Mr. Fryer: We have no objection to plaintiff bringing in that evidence if they want to make this witness their own and examine him on it, but in that event we shall rely on the ruling of the Supreme Court in Dravo against Fabel, which makes him bound by his answer. But we do object to cross examining a witness of ours concerning a subject about which he was not examined on direct.

The Master: Let me hear the question.

(Last question read.)

The Master: The objection will be overruled for the time being until such time at least as counsel further advises the Master as to its incompetency. You may proceed.

A. No.

Q. (By Mr. Geisler) The type of load lifting devices which is shown in your patent is the same as that in substance shown or [637] employed by the Willamette-Hyster in the manufacture of their straddle type of carriers, is it not?

Mr. Fryer: May we have a ruling, your Honor, that the same objection will go to this whole line of examination with respect to the patent issued on the application of this witness?

The Master: Yes, you may have such a stipulation, and the record will show that that will be the order.

(Testimony of Gustav A. Grab.)

The Witness: May I have the question again, if I am to answer?

(Last question read.)

A. Yes, but generally only, however.

Q. (By Mr. Geisler) While in the employ of the plaintiff in its shop at Dallas you became familiar with the plaintiff's patent, Plaintiff's Exhibit 2, did you not, Mr. Grab? A. Yes.

Q. You entered the employ of the Willamette Iron & Steel Works specifically for the purpose of taking charge of their carrier department?

A. Yes.

Q. Your knowledge and experience with carriers helped you to obtain that position, I presume, did it not?

A. I didn't get the entire question.

(Last question read.)

A. No. I would say Mr. Gerlinger's knowledge of my general knowledge of automotive equipment helped me to gain that position.

The Master: I think you are talking about something else, aren't you?

Mr. Geisler: I was talking about the employment by the Willamette Iron & Steel Works.

A. I failed to get that. I thought you were talking about my employment with the Dallas Machine & Locomotive.

The Master: No. The question was whether or not your familiarity gained of lumber carriers while

(Testimony of Gustav A. Grab.)

with the Dallas Machine & [638] Locomotive Works, whether that familiarity enabled you or aided you in getting the position with the Willamette Iron & Steel.

A. Yes, among my other abilities as to selling and knowledge with automotive equipment in general.

Q. (By Mr. Geisler) Referring to the Ross carrier which you said you saw in 1923, as I understand it, from your description of other load limiting control devices the automatic lift controls which are employed in the Willamette-Ersted carrier, Defendants' Exhibit 56-B, are practically the same as that shown in the Ross carrier?

A. Yes, they are substantially the same.

Q. That is your statement; is that right?

A. Referring to the Willamette carrier?

Q. Yes.           A. Yes.

Q. The difference only is that in the Ross carrier the control rod with the stops on it worked vertically while in the defendant's carrier that same kind of a rod with stops on it worked horizontally; is that right?

A. Yes, along with other minor differences in form of the machine as a whole.

Q. Do you know Mr. Ross?           A. Yes, I do.

Q. The Mr. Ross that you know is the man who builds these Ross carriers; is that right?

A. I understand he is the president of the Ross Carrier Company, yes.

(Testimony of Gustav A. Grab.)

Q. Now would you state again when you saw the Ross lumber carrier?

Mr. Fryer: May I have that question read, please, your Honor?

(Last question read.)

A. Some time after the middle of 1923, I would say towards the end of 1923.

Q. (By Mr. Geisler) How did you come to look at this particular carrier? [639]

A. My duties were to repeatedly go to Clark & Wilson Lumber Company to service and fix two Gerlinger carriers which we had in operation at the plant of the Clark & Wilson Lumber Company and during one of my service calls I saw the Ross carrier there.

Q. At that time the plaintiff was not manufacturing any mechanical lift carriers, was it?

A. No.

Q. The plaintiff was manufacturing only hydraulic lift carriers? A. Yes.

Q. How did you come to be interested in the construction of a mechanical lift carrier when the plaintiff, for which you were working, was not manufacturing such a carrier?

The Witness: May I have the question, please?  
(Question read.)

A. Prior to the construction of the hydraulic lift carrier I was employed by the plaintiff to construct and complete the design of a mechanical carrier.



(Testimony of Gustav A. Grab.)

Q. When did you receive that instruction from Mr. Gerlinger?

Mr. Fryer: Just a minute. May I have the last answer, please?

(Last answer read.)

Mr. Geisler: I withdraw that question.

Q. When you say instructed by the plaintiff, whom do you refer to?

Mr. Fryer: He didn't say instructed, your Honor. We object to that as misleading.

Mr. Geisler: Read it again kindly.

(The question and answer following were read:

“Q. How did you come to be interested in the construction of a mechanical lift carrier when the plaintiff, for which you were working, was not manufacturing such a carrier?

“A. Prior to the construction of the hydraulic lift carrier I was employed by the plaintiff to construct and complete the design of a mechanical carrier.”)

Q. (By Mr. Geisler) By whom were you employed in the plaintiff's shop?

A. By Mr. Gerlinger, the president of the Dallas Machine & Locomotive [640] Works, for the Dallas Machine & Locomotive Works.

Q. Was not your work merely that of carrying out the design which Mr. Gerlinger placed before you?      A. No.

(Testimony of Gustav A. Grab.)

Q. You were instructed, as I understand, by Mr. Gerlinger, to build this new type of lumber carrier?      A. Yes.

Q. When?

A. Prior to my actual employ by the Dallas Machine & Locomotive Works, Mr. Gerlinger approached me on different occasions and asked me to work for him to construct and help to develop a lumber carrier which he had in mind to build.

Q. That was prior to your entering the employ of the plaintiff, you say?      A. Yes.

Q. When did you enter the employ of the plaintiff?      A. In May, 1921.

Q. Isn't it a fact that Mr. Gerlinger told you of mechanical devices we he had relating to lumber carriers?

Mr. Fryer: We object to that unless the time and place is specified in the question. It is too indefinite to answer, if your Honor please.

The Master: Overruled.

A. I do not recall any such specific statement.

Q. (By Mr. Geisler) Do you recall a suit brought by William S. Overlin against the Dallas Machine & Locomotive Works in——

A. Yes.

Q. Wait a minute—in the District Court of the United States for the District of Oregon? Do you recall that suit?      A. Yes, I do.

Q. Were you not a witness in that suit?

(Testimony of Gustav A. Grab.)

A. Yes, I was. [641]

Q. Now I will read to you from the record in that suit. This is on page 115. If your Honor please, I have here a transcript of record in that case as furnished me. I have only one copy and it was loaned to me only by the United States Circuit Court of Appeals through the courtesy of Mr. O'Brien.

Mr. Fryer: Is it a certified copy?

Mr. Geisler: It is not a certified copy.

Q. I will ask the witness if he recalls giving this testimony: "In 1918, I was foreman of the repair shop in Dallas, at which place I took care of the gasoline equipment that the Willamette Valley Lumber Company was handling the lumber with and Mr. Gerlinger was general foreman of the Southern Pacific Railroad Shops and he was repairing all the mill machinery and camp machinery for the Willamette Valley Lumber Company outside of the trucks that they handled the lumber with, and I met Mr. Gerlinger and became intimate with him and we discussed mechanical devices and the several patents that Mr. Gerlinger had, and among others he told me confidentially about this lumber carrier that he was figuring on at that time."

Mr. Fryer: Now we object to that, if your Honor please, on the ground that no proper foundation has been laid for this.

(Testimony of Gustav A. Grab.)

The Master: Sustained. Sustained upon the ground that no proper foundation has yet been laid for your previous question.

Mr. Geisler: The witness stated that he gave testimony in this particular case as a witness.

The Master: Oh, yes, but reading the testimony would not be affirmative proof of any fact. It could only be used for the purpose of impeaching this witness' testimony at this time.

Mr. Geisler: Oh, I agree with that, your Honor. I didn't get the point.

The Master: So it will be necessary for you to lay the proper foundation by oral questioning before you call his attention to this particular testimony. [642]

Mr. Geisler: Well, to make a shortcut I am asking the witness now to state whether or not he gave such testimony in that particular case.

Mr. Fryer: That is what we are objecting to, if your Honor please.

The Master: It will be sustained. The ground of the ruling, Mr. Geisler, is that you have not yet asked the witness the affirmative facts with regard to the conversation with Mr. Gerlinger. Until that has been done, then you can't impeach him by calling his attention to contradictory testimony. I would suggest that perhaps if you would lay that foundation then you may proceed with your impeachment.



(Testimony of Gustav A. Grab.)

Mr. Geisler: Well, the reason I am pursuing the course I am—perhaps I am wrong, your Honor, but the witness stated that he was instructed by Mr. Gerlinger to get up these improvements in lumber carriers and now—very well; I will ask the witness this question:

Q. Did you have any conversation with Mr. Gerlinger about the building of lumber carriers prior to your employment with him?

A. Yes, I did.

Q. Did you discuss in that conversation mechanical devices with regard to the handling of lumber?

Mr. Fryer: We object to that question, if your Honor please, unless the foundation is further laid by asking the time and place and persons present.

The Master: Of course the objection is not as yet well taken. I think he may inquire upon that subject. You will read the question to the witness and he will answer.

(Last question read.)

A. I can't answer that question yes or no, because a great deal of time has elapsed and I have no way of recalling to my mind the particular words or the specific discussions we had at that time. [643]

Q. (By Mr. Geisler) What I want to know, Mr. Grab, is whether there was any talk between you and Mr. Gerlinger prior to your employment in the plaintiff's shop with regard to lumber lifts?

(Testimony of Gustav A. Grab.)

A. Yes, there was.

Q. Did not, in that talk, Mr. Gerlinger give you some confidential information as to his plans with regard to improving lumber lifts?

Mr. Fryer: We object to that on the ground that the talk referred to is not specified by reference to the time and place and persons present.

The Master: Overruled.

A. If I disregard your reading of the term "confidential", I would say that I don't recall having any confidential talks to that effect.

Q. (By Mr. Geisler) Well, did you not so state as a witness in the trial of the suit, that you did—in a suit pending in the United States District Court, the time being 1922 or 1923, that you did have such confidential conversation with Mr. Gerlinger?

The Witness: May I hear that question again please?

(Last question read.)

Mr. Geisler: About lumber carriers?

A. I cannot say just from memory.

Q. Do you recall, recollect the extract I read from this transcript of record in the case of Overlin vs. Dallas Machine & Locomotive Works, that I read just a moment ago? Would you like me to read it again? A. If you please.

Q. "In 1918 I was foreman of the repair shop in Dallas, at which place I took care of the gaso-

(Testimony of Gustav A. Grab.)

line equipment that the Willamette Valley Lumber Company was handling the lumber with and Mr. Gerlinger was general foreman of the Southern Pacific Railroad Shops and he was repairing all the mill machinery and camp machinery for the Willamette Valley Lumber Company outside of the trucks that they handled the lumber with, and I met Mr. Gerlinger and became intimate with him and we discussed mechanical [644] devices and the several patents that Mr. Gerlinger had, and among others he told me confidentially about this lumber carrier that he was figuring on at that time." Now do you admit or deny the giving of such testimony in that suit?

Mr. Fryer: We object to that question, if your Honor please, on the ground there has no proper foundation been laid.

The Master: I am compelled at this stage of the proceeding to sustain that objection. However, inasmuch as I am sitting only as Master, I think it is proper to suggest to counsel that he may interrogate this witness as to whether the reading of that transcript refreshes his recollection as to what the facts were and we will then see what the situation is.

Mr. Geisler: Very well, your Honor. I will adopt the suggestion.

Q. Does the reading of what I just quoted from the transcript of record in the case of Overlin vs.

(Testimony of Gustav A. Grab.)

the Dallas Machine & Locomotive Works, in transcript No. 4156, refresh your recollection as to the testimony you gave in that suit as a witness?

A. Yes, it does as to the particular portion of such testimony as you read to me.

Q. Well, did you so testify or did you not so testify?

Mr. Fryer: We make the same objection, if your Honor please; no proper foundation for an impeaching question of that sort addressed to this witness based upon a record such as counsel is using.

Mr. Geisler: Withdraw that question and say:

Q. Your recollection now being refreshed by what I read to you, do you recall the fact whether you had any confidential communication with Mr. Gerlinger regarding lumber carriers?

A. Yes; I recall now confidential conversation with Mr. Gerlinger regarding a lumber carrier which he figured on building.

Q. And the confidential communication with regard to these lumber carriers came from Mr. Gerlinger; is that right?      A. Yes. [645]

Q. In inspecting the plaintiff's hydraulic lumber carrier at Clark & Wilson in 1923, as I understand your occasion, or the occasion for your going to the Clark & Wilson Lumber Company, was to service the hydraulic lumber carriers which the Clark & Wilson Lumber Company still had or were



(Testimony of Gustav A. Grab.)

using, I should say, which they had bought from the plaintiff?

A. Yes, to the best of my recollection.

Q. On those servicing trips isn't it a fact that you often were accompanied by Mr. Dimick, who was also working for the plaintiff company?

A. I do not specifically recall. It is, however, possible that Mr. Dimick accompanied me on some occasions.

Q. And you both went to the Clark & Wilson Lumber Company for the purpose of servicing the plaintiff's hydraulic lifts?

A. If Mr. Dimick accompanied me at any time he probably went along as my assistant to fix up the broken down Gerlinger carriers.

Q. Now you would not say that Mr. Dimick did not go with you at any of those times, would you?

The Master: He has not said that. He said it is possible that he did.

Mr. Geisler: I didn't quite get that. Thank you.

Q. Did you talk to Mr. Dimick about this Ross carrier and its construction that you saw there at the Clark & Wilson Lumber Company?

A. It has been a long time since and I may have and I may not have. I can't say.

Q. Mr. Ballantyne was the secretary-treasurer of the plaintiff company, was he not?

A. Yes.

(Testimony of Gustav A. Grab.)

Q. Did you talk to Mr. Ballantyne about this particular Ross carrier that you saw at the Clark & Wilson Lumber Company?

A. Not that I recall. [646]

Q. And the only person that you talked to about this lumber carrier, according to your statement, is with Mr. Gerlinger, or to Mr. Gerlinger; is that right?

A. I can't say that. I, however, will state that I specifically recall talking to Mr. Gerlinger on various occasions about the stop mechanism on this particular Ross carrier.

Q. Mention one of the times and places when you talked to Mr. Gerlinger about this particular Ross carrier.

A. As to the particular time, it was after I saw the carrier, the Ross carrier, at the Clark & Wilson Lumber Company, and I talked to Mr. Gerlinger about the features mentioned heretofore primarily at his home and at his private office.

Q. Do you remember the time that that was approximately, what year?

A. On account of the cough I didn't get the entire question. Pardon me.

Q. Do you remember what year that was?

A. Beginning 1923.

Q. At the beginning of 1923?

A. No. I say, beginning 1923; from 1923 on.

Q. What was the date of your first conversation with Mr. Gerlinger about this Ross carrier?

(Testimony of Gustav A. Grab.)

A. I can't fix the exact date. However, I can say it was immediately after I saw the Ross carrier at the plant of the Clark & Wilson Lumber Company, which was shortly after the fall of 1923.

Q. Then you are positive, according to your statement, that you did talk with Mr. Gerlinger about this Ross carrier?

A. Yes, very positive.

Q. And you have distinct recollection of talking with him about it?      A. Yes, I do.

Q. But you have no distinct recollection about talking concerning this Ross carrier to any other person in the plaintiff's [647] shop or office?

A. No, I do not.

Q. And you are positive that the Ross carrier which you saw had automatic lift control, including a brake for the lifting devices, of a straddle type lumber carrier?      A. Yes.

Q. And that those were substantially the same as the control for automatic lifts which were adopted by the Willamette-Hyster Company and used in the building of their lumber carriers?

A. Yes, they were substantially the same.

Q. Now you could not possibly be mistaken as to the construction of that Ross lumber carrier, could you?      A. No.

Q. You are just as sure about that, that is to say, having seen the automatic control of a load

(Testimony of Gustav A. Grab.)

lifting device in the Ross carrier as you are of sitting in that chair where you are at the present time; is that right?      A. Yes, I am.

Mr. Geisler: I call for Plaintiff's Exhibit 51, please.

Q. I will ask you to look at Plaintiff's Exhibit 51, being the file wrapper which was the initiation of—at least, the file wrapper of the application for patent which matured in Mr. Grab's patent No. 1,838,939, dated December 29th, 1931. I show you a photostatic copy of the application in that case, in that application of the petition; the first would be the petition. Pardon me just a minute. The petition with power of attorney; is that your signature there—a photostatic copy of it?

A. Yes, it is.

Q. Now I turn to the petition in that file wrapper; it is on page 12 of the same; is that a photostatic copy of your signature?      A. Yes.

Q. Now I call your attention to page 13 of that file wrapper, which is the oath appended to that application, and ask you to state whether or not that is a photostatic copy of your signature?

A. Yes. [648]

Q. Now I would ask you to turn to page 4 of that file wrapper and read therefrom the statement beginning with line 7 as appearing in that application.

Mr. Fryer: If the Court please, this is again an exhibit to which we have our standing objection,



(Testimony of Gustav A. Grab.)

that under the well recognized authorities it has no place whatsoever in this record. Unless there is some purpose of impeachment here with respect to a document contained in this file wrapper the entire inquiry is wholly beyond the scope of the issues in this case, and according to a long line of well settled authorities the file wrapper of a patent on this machine has no materiality or relevancy, or place whatsoever in the record of an action brought for the infringement of another patent against the machine on which that file wrapper was taken out. An illustration of that law is found in a recent decision of the Circuit Court of Appeals for the Second Circuit in *American Metal Cap Company vs. Anchor Cap & Closure Corporation*, 20 Federal (2nd) 725, the particular place referred to being page 727. In that case an effort was made to use the file wrapper of a patent on the defendant's machine in support of the plaintiff's contention that the defendant's machine infringed.

The Master: Mr. Fryer, your objection may be well taken to a subsequent question. This question is merely asking the witness to read the particular lines, not to read them out loud.

Mr. Fryer: I thought the question was to read it into the record.

The Master: No.

Mr. Fryer: Oh, well, if it is not to read it into the record, then of course my objection is premature and I will withdraw it.

(Testimony of Gustav A. Grab.)

The Witness: May I hear the question again, please?

(Last question read.) [649]

Mr. Geisler: I am going to ask, your Honor, that the witness be permitted to read aloud from that file wrapper.

Mr. Fryer: Then I will ask leave to present my objection, if I may have just a moment, if your Honor please.

Now, if the question as modified by counsel calls for the reading into the record of any portion of this file wrapper on a patent obtained by someone connected with the defendant, and a patent which evidently plaintiff relies upon as having some relationship to the charge of infringement, we object to it on the ground of the rule which I have referred to and the rule in the case that I have just mentioned. The pertinent portion of that decision, which I say is one in which such a question as the admissibility of such a file wrapper as this was raised, reads as follows:

“Hence, we have no hesitation in holding that claims 2 and 4 are not infringed. So far as the defendant has taken any of Hammer’s inventions, it has taken from him earlier disclosure.” —that was the patentee’s disclosure. Now comes the part dealing with the file wrapper on the defendant’s structure. The Court said: “The validity of its own patent, and the representations by which it

(Testimony of Gustav A. Grab.)

was obtained, are altogether irrelevant. They are not estoppels.”

And that recent example of the well settled rule that the file wrapper on a defendant’s machine is wholly irrelevant to any issue is a suit brought for infringement on another patent by that machine.

The Master: Well, I don’t think the courts have gone so far as to say it is never relevant, because it might contain a recitation of fact which would be entirely relevant.

Mr. Fryer: Not in as far as the representation was made to the Patent Office as a reason for granting a patent on the defendant’s machine. There is no case in the books where any file wrapper on a defendant’s machine, I believe, has been held material and relevant for that purpose. [650]

The Master: What line was that? I want to see what this is and then I will be in a position to rule.

Mr. Geisler: It is on page 4, beginning with line 7. There are two very important reasons why this is very pertinent. One of the reasons I prefer not to state in the presence of the witness.

The Master: Now, this is line 7 on page 4?

Mr. Geisler: Yes, begins with the words “this application——”

The Master: “This application is substituted for application Serial No. 207873——”?

(Testimony of Gustav A. Grab.)

Mr. Geisler: Yes, then proceeding from there on.

The Master: For how far?

Mr. Geisler: Stating the objects. The other matters I shall refer to presently.

The Master: I am going to permit this to be read into the record at this time, Mr. Fryer, and shall ask you to make a motion to strike after counsel has reached and passed what he thinks is the material part of it. I cannot pass on that at this time.

Mr. Fryer: Very well, your Honor.

A. May I have the question, please?

The Master: Do you want him to read aloud from page 7, to what?

Mr. Geisler: Pardon me, your Honor, just a moment. That is on page 4 of that file wrapper, beginning at line 7 and reading down to line 31.

The Master: All right, you will do so.

A. "This application is substituted for application Serial No. 207873, filed July 22, 1927, and the invention relates generally to traversing hoists and particularly to a special form of lifting mechanism whereby loads may be picked up or lowered.

"The first object of this invention is to provide a [651] special form of lifting mechanism for traversing hoists which can be operated from the hoisting engine independently of any other duties which such engine is performing.



(Testimony of Gustav A. Grab.)

“The second object is to provide a dry transmission for the lifting mechanism to eliminate the undesirable scattering of oil over the lumber or other material being handled.

“The third object is to provide an exceedingly quiet and smoothly operating lifting mechanism which will require only a minimum application of hand power from the operator to control the lift which is locked in any position it is moved by the operator.

“The fourth object is to so construct the lift that the clearance between its upward and downward driving positions is exceedingly small, thereby making large level ratios possible.

“The fifth object is to so construct the drive that there will be no danger from wearing flat spots on the friction element.

“The sixth object is to provide a plurality of automatic stops for the lifting mechanism which will disengage same in either its upward or downward limit of travel, without load, and in its upward limit of travel, with load.

“The seventh object is to combine the load stops to the load binding mechanism.”

Q. Now will you please turn to page 12, beginning at line 2, commencing with “8. In a traversing hoist,” and so forth.

A. “8. In a traversing hoist, the combination of a wheeled frame having a load lifting mechanism

(Testimony of Gustav A. Grab.)

provided with a reversible friction thereon; an upper limit stop having connections to said friction drive whereby the lifting action shall be stopped when said lifting mechanism has reached its uppermost limit without a load.

“In a traversing hoist, the combination of a wheeled frame having a load lifting mechanism provided with a reversible [652] friction drive; and a downward limit stop whereby the downward travel of said load lifting mechanism shall be stopped when it reaches its lowermost limit of travel without a load.

“In a traversing hoist, the combination of a wheeled frame having a load lifting mechanism mounted thereon; a reversible friction drive for said mechanism; and a spring loaded yieldable load engaging the stop mechanism mounted on said frame whereby said friction drive will be released when the top of a load has reached its uppermost limit of travel.

“In a traversing hoist, the combination of a wheeled frame; a load lifting mechanism on said frame; a reversible friction drive for said mechanism; a plurality of stop means for disengaging said friction drive in a manner to stop the operation of said lifting mechanism when same reaches the upper or lower limit of travel without load or its upper limit of travel with load.”

(Testimony of Gustav A. Grab.)

Q. Now, those are the claims contained in your application when you filed the same with the Patent Office, is that right?

A. Yes, they are apparently some of the claims.

Q. Now, going back to the Ross carrier, the mechanism for limiting the uppermost travel of the load lifting devices is operated without any load being carried by the carrier, is that right?

A. Yes, that is right.

Q. Now, will you please explain why it was that you stated under oath in this patent application that you invented the mechanism described in claim number 8, for example, reading, "In a traversing hoist, the combination of a wheeled frame having load lifting mechanism provided with reversible friction drive thereon; an upper limit stop having connections to said friction drive whereby the lifting action shall be stopped when said lifting mechanism has reached its uppermost limit without a load"—please explain how it was that you made claim to such [653] an invention, when you had, as you stated previously, seen and knew of a construction in the Ross carrier which, as you state, is identical with the mechanism which is described by said claim 8?

Mr. Fryer: We object to that question, if your Honor pleases, as misquoting the testimony of the witness. The witness did not make any such state-

(Testimony of Gustav A. Grab.)

ment as is contained in the last few words of that question, and I will ask to have it read.

(The question was thereupon read.)

Mr. Fryer: Now, the last statement was never made by this witness. The question misquotes him and is misleading in that respect.

The Master: I think his testimony was substantially——

Mr. Fryer: Not even so. He made no reference to claim 8 as describing the claim 8 of the carriers of the defendants here accused as an infringement, and that is what the last part of the question implies.

The Master: I don't think I get your point. Will you state it.

Mr. Fryer: The question as it reads implies that the witness has stated that the defendants' Willamette carrier contains the combination described in claim 8 of the file wrapper which is now lying before the witness, whereas the witness has never stated at any time or intimated that the accused machine in this case contains the combination described in claim 8 in the file wrapper. On the contrary, he has positively stated that **this defendant** never at any time within six years prior to the filing of this suit made a machine containing the combination of that patent whose file wrapper is now before him, and the question assumes that very fact which the witness has specifically denied.



(Testimony of Gustav A. Grab.)

The Master: Well, perhaps I misunderstood the witness, but I understood him to say on his testimony—and I would like [654] to be corrected if I am mistaken about it—that in the Ross carrier it contained a frame with a load lifting mechanism, and that it had—I don't know whether he used the words “reversible friction drive”, but it used language which described the same thing—with a limit stop which had connections to the driving mechanism whereby that lifting action was stopped when the lifting mechanism had reached the upper limit.

Mr. Fryer: Quite true, Your Honor, but that is not what this question calls for. This question calls for what claim 8 in this file wrapper describes, which is not the mechanism Your Honor has just recited. In other words, the claim cannot be held up in thin air wholly disassociated from the application which is made and have any meaning whatsoever, according to all the laws in the books. This question asks this witness something about claim 8 in the file wrapper and assumes that he has said that certain mechanism comes within claim 8. Now, this witness has not tried to interpret claim 8 in the file wrapper and state what mechanism comes with it and what does not. And a mere recitation of parts is no proof whatever what that list of parts described in claim 8 defines, so that the question as put calls upon this witness for an interpretation of the claim 8 in the file wrapper which he has not yet

(Testimony of Gustav A. Grab.)

assumed to make. True he has stated that the Ross machine contains a certain number of enumerated parts but that is not a statement whatsoever by this witness that the Ross Machine contains the claim 8 in the file wrapper, because that is something separate and apart from anything that this witness has yet stated in his testimony. The parts in the Ross machine as a mechanical proposition are one thing, what claim 8 of this file wrapper before the witness means is a wholly different and separate thing, and the parts referred to in this claim 8 of the file wrapper, being a claim in a foreign, unrelated application may be a wholly different list of things from the parts in the Ross carrier which this witness has heretofore adverted to. [655]

Now, the vice in the question is that it assumes that point which I there deny, it assumes that the parts in the Ross carrier which your Honor has enumerated are the parts recited in claim 8 of this file wrapper, and it is that assumption which is the vice of the question. The witness has not so stated. He has recited the parts contained in the Ross carrier as one separate proposition. He has never said what are the elements of claim 8 of this file wrapper in that one particular application, defined as it must be in accordance with the disclosure of that application, and yet the question assumes that he has stated that the definition in claim 8 of the file wrapper before him is the same thing as he has

(Testimony of Gustav A. Grab.)

talked about previously when he has described a combination of parts in the Ross carrier, and it is that vice in the question we object to, and on that ground we contend it is misleading and assumes facts not testified to and is not proper.

The Master: I think for the time being I shall overrule the objection. I have a serious question in my mind as to whether or not this is proper cross-examination, as it has reference to the file wrapper, but I am reserving ruling on that and I will hear from counsel later. I am under the impression that the authorities, at least a number of them, hold as counsel has indicated. I think we had that up in the—not the Dailey case, but—well, the name of the case is immaterial right now, but I am going to permit him to answer this question and I will consider the whole matter as to the propriety of examining upon this file wrapper at a later time, and counsel have leave to renew their motion to strike.

Mr. Fryer: Very well, Your Honor.

Mr. Geisler: And at that time, Your Honor, I shall go more deeply into the subject.

The Master: Yes, of course. I am not foreclosing, or stating any opinion. [656]

Mr. Geisler: Yes. I might state at this time I have no objection to the witness listening in, that in part the main purpose, as presented, the question is presented here for the purpose of testing the veracity of the witness. Here on one statement, both



(Testimony of Gustav A. Grab.)

under oath, he says that the construction of the Ross carrier was in substance like the stop limitation, the limiting means, controlling means, employed in the device built by the Willamette-Hyster Company, and it is further connected that the Willamette-Hyster Company straddle truck is substantially as shown in this picture which we have here on the chart of Mr. Grab's patent. Now, the question I would like to have some information on is how he could make claim to those particular features, that is to say, a stop so contrived as to limit the rise of the load lifting mechanism not dependent upon carrying any load.

The Master: I am permitting you to go ahead.

Mr. Geisler: Yes, Your Honor. I mean that is aside from the question as to what bearing the file wrapper may have otherwise. Now, there is another point in connection with that. The invention is a question of fact, Your Honor. It may be that this is an original question, but in any case cause may arise away from the original question. Invention is largely a question of fact. When the examiner in the Patent Office passes on it it is giving his expert opinion on the question of fact whether in his judgment the thing is not patentable or if it is distinguishable or not distinguishable from a prior art, and I think that has bearing on it; but I believe so as not to delay the procedure here, we will pass that up for the time being and I will ask that the wit-



(Testimony of Gustav A. Grab.)

ness be instructed to answer the question, at least requested to answer the question, and I ask the reporter kindly to read the question so the witness may know it.

The Master: You will read the question to the witness and he will answer it. [657]

(The question was thereupon read.)

Mr. Geisler: May I change a word, Your Honor, "identical" to "substantially"?

The Master: Yes, "substantially the same,".

A. The mechanisms and features referred to are just portions of an entire combination which I applied for patent on. I passed the general information on to my patent attorney to the best of my ability and gave him power of attorney to put it into legal form, and I feel that—I personally feel that these items I am asked about are only a part of a combination including numerous other parts and mechanisms which I at that time considered new and an invention.

Q. (By Mr. Geisler) Now, Mr. Grab, you have been testifying here regarding other patents for quite a while in this case, have you not?

A. Yes.

Q. And you understand patents pretty well, do you?

A. I understand mechanical features of the patents as they are described and shown in the drawings of the patents.

(Testimony of Gustav A. Grab.)

Q. Now, going back to claim 8, you may read it to yourself and explain to the Court if there is anything in that claim in your application for patent on your patent which matured—plaintiff's Exhibit 47—state whether there is anything in that claim which you do not understand?

Mr. Fryer: With respect to this line of examination, if the Court please, merely to preserve our record, we wish to object on the ground that this is not cross examination. We have no objection to counsel going into it, but we wish to take advantage of the rule I previously cited that in doing so counsel makes the witness his own. This witness has not been asked to construe any claim in his direct examination. His testimony bearing upon that subject in final analysis amounts merely to this, he has stated that certain language [658] on a document is copy of other language which he saw in a patent. That is as far as he has been asked to talk about a claim on his direct examination. The remainder of the examination has been very carefully and exactly confined to a discussion of mechanism and parts defined in certain language. He has not been called upon to construe the scope of any claim. So that this cross examination is now calling upon him to exercise the legal function of construing a claim as such and exceeds the scope of the direct examination, and for that reason we make our objection in order to take advantage of the rule I have heretofore called to the Court's attention.

(Testimony of Gustav A. Grab.)

The Master: The objection will be overruled. The question is whether there is anything in that language which he does not understand.

Mr. Fryer: The language, Your Honor, is a claim, which is a matter calling for a legal conclusion that is our objection.

The Master: Yes, but in your direct examination you were asking him as to whether or not he found in these various devices this element, this element, this element, which were themselves individually the language of claims of the patent in suit and which in the whole were the claim of the patent in suit.

Mr. Fryer: The language in my question, Your Honor, but——

The Master: Yes, all right, but if he answered that question he had to construe the language.

Mr. Fryer: He did not construe the claim, we still contend, Your Honor. That is still our position.

The Master: Very well, you may proceed to answer.

A. May I hear the question again, please?

(The question was thereupon read.)

A. I understand the wording, or I understand the claim literally. [659]

Q. (By Mr. Geisler) You read the application, the specification of your application for patent, before signing the same, did you not?

A. Yes.

(Testimony of Gustav A. Grab.)

Q. Have you any further explanation to give why you made the claim there contained in claim 8 of your patent? A. No.

The Master: Is this an appropriate time for recess, or do you have some questions you prefer——

Mr. Geisler: I just have one more question, Your Honor, and then I——

The Master: All right, go ahead. Go ahead.

Mr. Geisler: Yes, thank you. Isn't it a fact, Mr. Grab, that you were discharged from the employ of the plaintiff corporation about January 1st, 1926?

A. Yes. Mr. Gerlinger discharged me after having some words, but at the first opportunity he told me he was sorry he blew up at the time and I should have known better than to take him by his word, as he was not responsible for what he said since he was sick at that time.

The Master: We will recess for five minutes.

(A short recess was thereupon had, after which proceedings were resumed as follows:)

Mr. Geisler: No further questions, Your Honor.

#### Redirect Examination

By Mr. Fryer:

Mr. Fryer: May I have Exhibit 76, if the Court please?

The Master: Seventy-six?

Mr. Fryer: It is that red folder,—at least, one page in the red folder.



(Testimony of Gustav A. Grab.)

The Master: Oh, yes.

Mr. Fryer: Will you hand it to the witness, please? Will [660] you state whether or not the entire folder of which the page Exhibit 76 is a part is an advertising folder referred to in your testimony and put out by the defendant Willamette-Hyster Company? A. Yes.

Q. Did you personally have anything to do with the preparation of the entire subject matter contained in this folder?

A. Yes, I arranged for all the photographs and wrote all the copy in this folder.

Q. Will you state whether or not the various representations of carriers contained in the folder doing different sorts of work truly and correctly represent the usual and customary work performed by those carriers? A. Yes.

Mr. Fryer: We now offer in evidence the remainder of the folder in which Plaintiff's Exhibit 76 is contained and ask that it be marked Respondents' Exhibit 77.

Mr. Geisler: No objection.

The Master: It will be so marked.

(The portion of the folder referred to was thereupon received in evidence and marked Respondents' Exhibit 77.)

Q. (By Mr. Fryer) Will you now look at pages 18 and 19 of the folder Exhibit 77 and explain what operation with a Willamette carrier is shown in that photograph?

(Testimony of Gustav A. Grab.)

A. It is an end-lift operation.

Q. When you say "end-lift" do you mean that the machine which is there lifting a load is capable of lifting a load only by a lift across its front end?

A. No, this machine is also capable of straddling a load and carrying it underneath, and the operation pictured is an end-lift operation.

Q. Will you now refer to page 32 of Exhibit 77 and state whether [661] or not you find on that page any illustration of the capacity of the Willamette-Hyster carrier to perform both the function of straddling a load and lifting a load by means of an end-lift?

A. Yes, the carrier pictured on the top of page 32 has a load across one end as well as a load underneath.

Q. Will you describe what the operation immediately below the one you have just described is on page 32 of Exhibit 77?

A. Pardon me, I didn't get the entire question on account of some noise.

Mr. Fryer: May I have the question read, please?

(The question was thereupon read.)

A. It also is an end-lift operation. However, it is the same carrier as the one pictured above, which is also capable of handling a load underneath.

Q. Now, will you describe what the operation is that is shown in the upper portion of page 33 of Exhibit 77?

(Testimony of Gustav A. Grab.)

A. It is also an end-lift operation with a combination end-lift and straddle type carrier.

Q. On the face of Exhibit 77, which is in evidence as Plaintiff's Exhibit 76 reference is made to high piling. Will you point out what if anything is contained in Exhibit 77 to illustrate the high piling there referred to?

A. Photographs shown on pages 28, 29, 30, 31, 32 and 33.

Q. In that high piling being done with a lift truck exclusively or with a truck capable of operation both as a straddle truck and as a lift truck?

A. It is with a truck or carrier capable of operating as a lift truck and as a straddle type truck.

Q. Will you state whether or not in your experience in the carrier business you have found anything in the construction of an ordinary lift truck which renders it unsuitable or unpractical for use in a straddle truck? [662]

A. I have not.

Q. Will you state whether or not in your experience you have found that the mechanisms employed in a lift truck are to any extent interchangeable with mechanisms employed in straddle trucks?

A. Yes, they are. In fact, we are doing so right along in our regular manufacture of carriers.

Q. I call your attention to pages 20 and 21 of the exhibit 77, in which the carriers are shown hauling varieties of products, such as pulp, lime rock, sulphur, and other materials. Will you state

(Testimony of Gustav A. Grab.)

whether or not those are all usual and customary purposes for which carriers of this type are employed?

A. These photographs are photographs of carriers and their actual operation, and we have a number of carriers employed in various operations doing the same type of work as that pictured on these two pages.

Q. In your experience in the carrier business have you found that the characteristics of a carrier suiting it for use in handling lumber render it unsuitable for use in handling other products?

A. No.

Q. Will you state whether or not in the carrier business you have found that a carrier in order to be sold in the lumber trade must also be a carrier suitable for handling all sorts of products?

A. Yes.

Q. Have you found in your experience in the carrier business, or have you not found, that the characteristics of a so-called lift truck in any way affect or detract from its adaptability for handling lumber?      A. No.

Q. Is a lift truck adapted or unadapted for use in handling lumber?

A. It is adapted and sold in many cases for the specific purpose of handling lumber only. [663]

Q. Do you find in your advertising circular Exhibit 77 a lift truck illustrated as handling lumber



(Testimony of Gustav A. Grab.)

only?—and by lift truck I mean one which is not also a straddle truck.

A. Yes. I do, in the lower left-hand corner of page 32.

Q. Will you state whether or not a lift truck such as shown in the lower left-hand corner of page 32 of Exhibit 77 is useful and is actually employed for tiering lumber in various industrial operations?

A. Yes, it is.

Q. Will you state whether or not there is any thing in the hoisting mechanism or the controls therefor in a carrier which in any way affects the rate of speed at which that carrier can travel over the surface of the ground?

A. No, there is not.

Q. Do you recognize any relationship whatsoever between the road speed of a carrier and the particular type of lifting mechanism or controls therefor employed in that carrier?

A. No, I do not.

The Master: Let me hear that last question.

(The last question and the answer thereto were thereupon read.)

Mr. Fryer: The road speed of—pardon me, Your Honor.

The Master: All right.

Q. (By Mr. Fryer) The road speed of a carrier is determined entirely by the motor speed and the transmission mechanism between the motor and the drive wheels of the carrier, is that right?

(Testimony of Gustav A. Grab.)

A. That is right.

Q. Does the hoisting mechanism have anything to do with the propulsion of the carrier along the road in any of your products?

A. No, it does not.

Q. Is that true of all carriers in your experience?      A. Yes to my best knowledge. [664]

Mr. Fryer: We now offer in evidence a copy of the Ross patent 1209209, issued on December 19, 1916, and ask that it be marked Respondents' Exhibit 78.

(The patent referred to was thereupon received in evidence and marked Respondents' Exhibit 78.)

Q. (By Mr. Fryer) Have you a copy of the Ross patent 1209209 before you, Mr. Grab?

A. Yes, I have.

Mr. Geisler: Those patents, if your Honor please, are merely with regard to prior art, is all, and not cited.

The Master: I take it that they are being offered as showing the state of the prior art.

Mr. Fryer: Yes, Your Honor, just to show the antiquity of the idea of a straddle truck for hauling different types of products.

Q. (By Mr. Fryer) Have you heretofore read and examined the Ross patent 1209209, Respondents' Exhibit 78?      A. Yes, I have.

Mr. Fryer: At this time we also offer in evidence a copy of patent number 537628 to Boudinot,

(Testimony of Gustav A. Grab.)

granted April 16, 1895, and ask that that be marked Respondents' Exhibit 79. This patent also is offered to show the antiquity of a straddle truck as a means for conveying lumber.

(The patent referred to was thereupon received in evidence and marked Respondents' Exhibit 79.)

Q. (By Mr. Fryer) Have you before you, Mr. Grab, a copy of the Boudinot patent offered in evidence as Respondents' Exhibit 79?

A Yes, I have.

Q. Have you heretofore read that patent?

A. Yes, I have.

Q. Will you state whether or not, with the structure of those two straddle trucks before you, you as a mechanic would have [665] any difficulty in installing in said trucks the hoisting mechanism and controls therefor found in the Dingee patent?

A. No, I wouldn't have any difficulty to do so.

Q. Would the Dingee patent suggest to you the idea of doing so, if you had in mind the construction of a vehicle for transporting lumber?

A. Yes, it would.

Q. I believe you have stated on your cross examination that the patents to Dingee, French, Nicholson, Towson and Carr did not suggest to you a lumber carrier. Will you state whether or not you meant by that assertion, if you made it, that none of those elevator mechanisms are suitable for carrying lumber?

(Testimony of Gustav A. Grab.)

Mr. Geisler: I think that is rather leading, if your Honor please.

The Master: I think it is. Sustained.

Mr. Fryer: May I have the answer for the record, if your Honor please?

The Master: You may. Read the question to the witness, if you will.

(Last question read.)

The Master: My ruling was wrong there. The objection will be overruled.

A. I either misunderstood the question or I erred when I made that statement. I now wish to state that all those devices are adapted for carrying lumber.

The Master: You mean for carrying lumber, or for lifting and lowering lumber?

A. For lifting, lowering and carrying lumber.

Q. (By Mr. Fryer) What is your understanding of the character of a load of lumber, for instance, which is shown on the load lifting means of the French patent in Figure 1 of that patent?

A. The load shown in Figure 1 of the French patent may well be a load of lumber. [666]

Mr. Fryer: May I now have Exhibits 71 to 75, please?

Q. I will now ask you to look at the photographs, Exhibits 72, 73, 74 and 75 and state whether or not the use being made of straddle trucks as shown in those photographs is the only way in which straddle trucks are used in the handling of lumber.



(Testimony of Gustav A. Grab.)

A. No. The method shown, or the particular use shown, is only a small portion of the way of handling lumber in a lumbering operation.

Q. Will you state whether or not from your experience in the carrier business the scenes represented in the photographs, Exhibits 72, 73, 74 and 75, portray the only way in which lumber is ever handled by the use of straddle trucks?

A. No, they do not.

Q. Will you state whether or not various other and different ways of handling lumber are encountered in the usual operation of lumber yards and mills besides those shown on Exhibits 72, 73, 74 and 75? A. Yes, they are.

Q. Is it your understanding that in the operation of the Nicholson construction the load lifting means in the normal operation of the machine is operated while the portion of the frame in which the load lifting means moves is inclined from the vertical? A. No, it is not.

Q. Will you state what your understanding is of the operation of the Nicholson machine when the load lifting means and the frame in which it is supported is inclined from the vertical?

A. The load lifting means and power transmission means to the load lifting means cannot function when the frame structure is in the dotted line position. The purpose of placing the frame structure into the dotted line position is to facilitate the

(Testimony of Gustav A. Grab.)

moving of the structure where there are low overhead clearances and not for operating the mechanism in this dotted line position. [667]

Q. In other words, then, the dotted line position shown in Figure 1 of the Nicholson patent is one which is resorted to solely when the machine is transported from place to place and not when it is the object to transport a load of material from place to place; is that your understanding?

A. Yes, that is right.

Q. You have referred to a bolster in your cross examination. Have you anything by which you could explain what you mean by the term bolster?

A. Yes. I have a drawing or cut showing a bolster and the way it is used in our catalogue, Exhibit No. 76.

Q. 77 I believe it is.           A. Yes, 77.

Q. 77 is the entire catalogue, Mr. Grab.

A. Pardon me; 77, on page 34 of this catalogue.

Q. Is the part shown in that drawing indicated in any way?

Q. Yes; it is shown in solid black, with the name "Bolster" in white thereon.

Q. Will you state whether or not any of your visits to the Clark & Wilson Lumber Company's plant, about which you have testified, were made by you unaccompanied by Mr. Dimick?

A. Yes, numerous ones.

Mr. Fryer: Now I have just one more question I would like to ask the witness, which is not redirect,

(Testimony of Gustav A. Grab.)

your Honor, if I may have the Court's leave to do that.

The Master: You may.

Q. (By Mr. Fryer) During the time that you have been with the Defendant Willamette-Hyster Company, or its predecessors in business, how much in round numbers is the total gross sales of carriers having the construction generally of the defendant Clark & Wilson's Willamette carrier?

A. Well over two million dollars.

Mr. Fryer: No further questions, your Honor.  
[668]

The Master: Any recross?

Mr. Geisler: No recross, your Honor.

The Master: You may be excused.

(Witness excused.)

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The Master: Call your next witness.

Mr. Fryer: The defendants rest, your Honor.

The Master: Any rebuttal?

Mr. Geisler: Yes, your Honor. Call Mr. Dickson.

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## REBUTTAL

### JOHN DICKSON

was thereupon produced as a witness in behalf of the plaintiff herein, in rebuttal, and, having been

(Testimony of John Dickson.)

first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Geisler:

The Master: State your name and address.

The Witness: John Dickson; 1917 Northeast Fremont, Portland, Oregon.

Q. (By Mr. Geisler) Mr. Dickson, what is your occupation?

A. I am master mechanic for the Spokane, Portland & Seattle Railway.

Q. What experience have you had with mechanical constructions?

A. Well, after coming out of school I went to serve a machinist apprenticeship and was foreman of airbrake repairs for the Great Northern; I was draftsman for the Great Northern. I left the Great Northern Railway and was instructor for two years at the Mechanical Art High School, St. Paul, Minnesota. I left there to go as general airbrake instructor on the Great Northern Railway. I left that position to install machinery in the Everett shops for the Great Northern, was then superintendent of the shops, was promoted from there to master mechanic of the Dakota [669] Division of the Great Northern Railway; was transferred to the Spokane, Portland & Seattle Railway as its first master mechanic when it opened up. Since being with the Spokane, Portland & Seattle Rail-



(Testimony of John Dickson.)

way I was promoted to superintendent of motive power, and now I am in charge of mechanical and electrical departments of the railway, including the Oregon Electric.

Q. You may state whether or not in your work you have had occasion to read patents, study patents.

A. Yes, sir, I have.

Q. Have you taken out any patents of your own?

A. Yes, sir, I have.

Q. I show you here the patent issued to Carr, No. 1,407,124, dated February 21, 1922, on elevator truck, being Defendants' Exhibit 69. Are you familiar with that patent, Mr. Dickson?

A. Yes, sir.

Q. Would you please describe briefly the purpose of that patent, I mean the devices described in it and the work they do?

A. This is an end lift——

Q. A little louder, kindly, Mr. Dickson, so the Court can hear you.

A. This is an end lift truck. It is operated by a screw, which is centrally located between two columns. It has a fulcrum and nut on the screw. The fulcrum is connected with a lever or arm which has a roller on each side of it, or a roller with bars, one on each side of the column, and as the screw is operated the nut is raised, which carries the platform with it. The screw is operated with a worm, a wheel—through a wheel—a gear on the bottom of

(Testimony of John Dickson.)

the screw, and that worm is driven by a motor which is connected to the shaft that drives the worm. On the mobile part of it it has a separate motor which moves the truck back and forth. It is equipped with a brake, and the brake is operated by stops on a vertical rod, one on top and one [670] on bottom of the vertical rod, which come in contact with rollers on the casting that the platform is attached to, so that when the platform is at the bottom it automatically stops the platform from going any further. When it strikes the down or upper side it stops the platform from going any further up. However, it is necessary to throw an electric switch which operates the motor, and the stopping and starting is done through stopping and starting of the motor. It has no clutch that would do this, as the operation depends entirely on the shutting off of the current off of the motor, or the reversing of it. It is designed for an end lift truck. The platform is on one end only, making it a truck purposely designed to raise a single platform. Do you want me to go into the entire details of the building of this thing?

A. No; I just want to get a brief description. Are you familiar with the straddle type of lumber carriers? A. Yes, sir.

Q. You may state whether or not in your opinion this Carr patent gives any suggestions as to how a straddle type of lumber carrier, with lift controls, may be built.

(Testimony of John Dickson.)

Mr. Fryer: We object to the question on the ground that no proper foundation with respect to the qualifications has been made for this question.

Mr. Geisler: He is a mechanic, well versed.

The Master: Well, I don't know whether you have shown that he is familiar with the construction of straddle carriers. I think you asked him whether he knew what they were.

Q. (By Mr. Geisler) Would you please state whether you are familiar with the construction of the straddle type of lumber carriers?

A. Yes, sir, I am.

Mr. Fryer: The same objection. [671]

The Master: Overruled. You may answer. You may ask the question, Mr. Reporter, to which objection previously has been made.

(The second to last question was read as follows: "You may state whether or not in your opinion this Carr patent gives any suggestions as to how a straddle type of lumber carrier with lift controls may be built.")

A. I would say it does not.

Q. (By Mr. Geisler) Have you any reason to advance for your opinion?

A. Well, there are a number of other machines entirely foreign to all of this equipment that would suggest better arrangements than are shown on this patent.

(Testimony of John Dickson.)

Q. By "this patent" you mean the Carr patent?

A. The Carr patent.

Q. Proceed, please. You may go ahead with your answer.

A. For one thing, it lifts only on one end, while a straddle type lumber carrier must lift on all four points. Second, this has no clutch, which I consider is a very necessary thing for quick handling and safety in connection with a straddle type lumber carrier. Those are the main objections that I would have to it.

Q. You may state whether or not in your opinion there is any similarity between a straddle type of lumber carrier and an elevator or wheel-mounted elevator.

A. I do not consider there is any similarity.

Q. Now having reference to the devices which are described in the Carr patent for the control in an automatic manner of the load lifting devices so as to stop them at predetermined elevations in the up or down movement, apply a brake, you may state whether or not in your opinion the devices which are shown there in the Carr patent could be carried over into the building of a lumber carrier. [672]

A. Well, I would say as they are in here they would have to be changed considerably before they could be used for that purpose.

Q. You may state if you were asked to build the straddle type of lumber carrier whether the sugges-



(Testimony of John Dickson.)

tions with regard to lumber lift control shown on the face of the Carr patent would enable you, or would not enable you, to build a straddle type of lumber carrier with a control for the load lifting mechanism.

A. Well, it would not suggest anything to me in the way of parts for a straddle type lumber carrier that I could use, or it wouldn't suggest building a lumber carrier of a straddle type to me, or any part of it, with probably the exception of the construction of the brake itself, the small portion down here on the brake. I believe that could be used anywhere.

Q. Now I would like to call your attention to the patent in suit, Plaintiff's Exhibit 2. I direct your attention to Figure 3 of the patent drawings. Have you studied this particular patent? Have you studied this patent?

A. Yes, sir.

Q. Are you familiar with it?

A. Yes, sir.

Q. Now look at the part designated 65 in Figure 3 of the patent drawings and state what they are, their functions.

A. 65?

Q. Yes, please.

A. 65 is a stop that is fastened to the upper part of the rack bar that has an adjustable screw in it for the purpose of operating the stopping mechanism of the car—of the lumber carrier.

Q. You may state whether or not it stops it merely in one direction.

(Testimony of John Dickson.)

A. Yes. It is the stop for the lower movement of the lumber carrier rack bars.

Q. Now you may state whether or not in your opinion there would be any problem presented for the employment of a similar stop [673] for controlling the upward movement of the lumber carrying devices, the rack bars.

A. Why, I would say not. It would very readily suggest other stops on the same rack bars.

Mr. Geisler: You may take the witness.

#### Cross Examination

By Mr. Fryer:

Q. What are some of the patents that you have taken out, Mr. Dickson?

A. I invented the lining for a box car. I invented a cylinder cock, an automatic cylinder cock, and an oil circulator for applying to journal boxes on locomotives and cars.

Q. Anything else?

A. I have applied for others but didn't get a patent.

Q. What others did you apply for?

A. I won't say I applied for them. That is, I had searches made, but did not apply.

Q. Will you now name all of the types of mechanisms that you personally have worked on besides these inventions of yours that you have either patented, or thought of patenting?

(Testimony of John Dickson.)

A. They are so numerous that I could hardly mention all of them.

Q. Well for instance, did you ever build an automobile?

A. No, I never built an automobile but I have built, or supervised the building of, motor cars.

Q. In what connection did you do that?

A. In connection with motor cars used for transportation of officials and section foremen on the railway.

Q. By motor cars, then, you mean these power driven cars that move over the rails of a railroad system; is that it?      A. Yes, sir.

Q. Did you ever try to build a straddle truck?

A. No.

Q. Did you ever try to build a lumber carrying truck for travel [674] over the highways?

A. No.

Q. Have you ever seen the machine of the Carr patent, about which you have testified, in actual use?

A. No, I have only read the drawings.

Q. In the drawings of the Carr patent the part which you say is a switch is contained in the box 69; is that your understanding?      A. Yes, sir.

Q. The patent doesn't give you the details of the construction of whatever mechanism is contained within that box, does it?

A. Well, it does not. The patent doesn't, but we know what it should contain.

(Testimony of John Dickson.)

Q. Your understanding is that it contains any suitable kind of mechanism to turn the power on or off, or to reverse the direction of flow; is that your understanding? A. Yes, sir.

Q. And that is accomplished by working the part 71, which is shown in Figure 8 on the outside of the box backward or forward, in one direction or another; is that right? A. Yes.

Q. And that part 71 on the outside of that box 69, which, when rotated, works the mechanism inside of the box, is in turn pushed one way or the other by the link 72; is that true? A. Yes.

Q. And the link 72 is made to act in that way by the connected linkage consisting of a bell crank lever 73 and a link 74, which connect up with the vertical rod 75; is that your understanding?

The Witness: 73? Say that again, please.

Mr. Fryer: Read the question, please.

(Last question read.)

A. Yes, sir.

Q. Now in your testimony you have referred to a clutch? A. Yes. [675]

Q. As a certain mechanism usable for certain purposes. Did you mean by that a clutch which could be moved by pushing a member in or out?

A. No, sir.

Q. What kind of a clutch did you mean?

A. I meant what the common definition of a clutch is.



(Testimony of John Dickson.)

Q. What is that common definition of a clutch, as you understand it?

A. Well, in mechanics a clutch is a power transmitting device operated by friction or interlocking to secure or brake rotative continuity as between two shafts, or between a pulley and a shaft.

Q. Now in all of those various forms of mechanism which you consider included in that definition of a clutch, what, if anything, is used to connect or disconnect the clutch?

A. Well, there may be various means. Any means either directly connected to the essentially movable part of the clutch is all that is necessary.

Q. And those essential means, I assume, are ones which necessitate some sort of movement from an external source in order to cause the clutch to become either engaged or disengaged; is that your understanding?

A. Yes, sir.

Q. As a matter of fact, most clutches are operated by crank or a lever which is pushed to one position or another, to either put the clutch in or out of engagement; is that right?

A. Yes.

Q. What is the answer?

A. Yes. I said "yes".

Q. The clutch in an automobile, for instance, is put in or out of engagement by pushing the clutch lever in or out on the footboard of the machine; is that your understanding?

A. Yes.

(Testimony of John Dickson.)

Q. Various other mechanisms, whether the clutch is a jaw clutch or a friction clutch, it is customary and usual to employ a handle [676] or other swinging lever which can be pushed in one direction or another to put the clutch in or out of position; is that right?      A. Yes.

Q. Now will you tell me what there is in the mechanism of the Carr patent which renders all of the structure therein, which we have just referred to, including the link 72, the bell crank lever 73, the link 74 and the rod 75, which makes those parts incapable of pushing a clutch lever back or forth in order to engage or disengage the clutch?

A. They could be arranged to move a clutch.

Q. If the part 71 on the drawings of the Carr patent, instead of being the handle on an electric controller were the lever of a clutch, is it or is it not your understanding that movement of link 72 would serve to engage and disengage the clutch?

A. If it was arranged to suit the machine that it was to operate.

Q. I don't believe you have answered the question. I will put it again and see if you can answer it directly. If the lever 71 of the drawings of the Carr patent were connected to a clutch instead of a controller, would or would not the link 72 and the connected parts of the Carr drawing serve to operate the clutch connected to the lever 71?

(Testimony of John Dickson.)

A. Yes, if a clutch was on this machine it would.

Q. In other words, if we had a clutch in the box 69 instead of an electric controller, the linkage shown in the Carr drawings comprising that lever 71 sticking out of the box 79, the link 72 and the bell crank lever 73, and so forth, could be made to operate a clutch if a clutch was contained in that box; is that your understanding?

A. A clutch could not be contained in that box, because it is not located properly on the machine to operate.

Q. Well, that may be an interesting problem but it is not the one I asked you about. Now I will ask you to state directly your answer to this question. If in the box 69 there was contained [677] a clutch mechanism, either of the friction or the jaw type, connected to the handle 61 on the outside of that box, will you state whether or not the linkage 72, 73, 74, and so forth, of the Carr patent, would be a suitable linkage to operate the clutch which my question assumes would be located in the box 69?

A. Well, tell me just how the clutch would be connected to those levers.

Mr. Fryer: If your Honor please, I move to strike the answer and have the question read to the witness, which calls for a "yes" or "no" answer and whatever explanation the witness cares to make.

(Testimony of John Dickson.)

The Master: I think the question, Mr. Dickson, is that you are to assume that those levers and this linkage connect with the clutch lever.

Mr. Fryer: Yes; and we assume there is a clutch in the box 69, and that the handle 71 sticking out of the box is the control lever for the clutch; then the question is, will the linkage 72, 73 and 74 be satisfactory to operate the clutch which we assume is in the box, or will it not?

A. Well, I believe I could design them to do that, yes.

Mr. Fryer: I move to strike the answer as not responsive, if the Court please.

The Master: He said "yes".

Mr. Fryer: I didn't hear, your Honor.

The Master: He said "yes".

The Witness: May I explain, Judge?

The Master: Yes. Go ahead.

The Witness: This patent shows dimensions of levers, rods, bell cranks, and so forth, and, as I understand, I am asked whether these as they are would operate a clutch?

The Master: You mean as to size and dimension?

The Witness: Just as they are right in this patent. [678]

The Master: Well, of course, your patent drawing has nothing to do with size or dimension.

The Witness: Well, I could say that they would operate a clutch, yes.



The Master: We will now adjourn until ten o'clock tomorrow morning.

(Whereupon, at 5:06 o'clock P. M., December 1st, 1936, an adjournment was taken until tomorrow, December 2nd, 1936, 10:00 o'clock A. M.) [679]

Portland, Oregon, December 2, 1936

10:05 o'Clock A. M.

(Pursuant to adjournment)

Mr. Geisler: Do you want to cross examine, Mr. Fryer?

Mr. Fryer: No questions.

Mr. Geisler: Call Mr. Paul.

The Master: Mr. Hall?

Mr. Geisler: Paul (spelling) P-a-u-l.

The Master: Mr. Paul.

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## WILLIAM HOWARD PAUL

was thereupon produced as a witness in rebuttal, and, having first been duly sworn, was examined and testified as follows:

### Direct Examination

By Mr. Geisler:

The Master: State your name and address.

A. William Howard Paul, 25 North 27th Street, Corvallis, Oregon.

The Master: Just take the stand.

(Testimony of William Howard Paul.)

Q. (By Mr. Geisler) What is your business, Mr. Paul?

A. Education.

Q. Where are you employed? Please state fully.

A. I am Assistant Professor of Mechanical Engineering in the Oregon State College.

Q. What experience have you had in the practical use of mechanics, practical application?

A. My experience consists of about twelve years of shop work in automobile maintenance and some ten years' experience on the teaching staff of the College in subjects such as mechanical drawing, in all of the related subjects of heat engineering in the mechanical engineering course, including mechanical laboratory; and then summer work with Portland Gas & Coke Company as refrigeration engineer, worked with the State [680] Highway Department as automotive test engineer, worked with the Pacific Gas Association three summers as draftsman, and worked with the Dallas Machine & Locomotive Works one summer as a designing draftsman.

Mr. Geisler: I would like the witness to be shown the Carr patent, Defendants' Exhibit 69. You may look at that patent and state whether or not you have studied the same.

Mr. Fryer: If your Honor please, at this time we feel compelled to object to this testimony, which is apparently some further testimony solely in the

(Testimony of William Howard Paul.)

nature of expert exposition of matters in the cause. This is the fifth expert witness produced by the plaintiff in this case. The defendants has not produced any so-called patent experts. It has had but one witness in the cause dealing with the patent aspects of the case, and that witness was merely a man skilled in carriers and not a patent man. It is true that the number of experts allowed to a side is a matter within the discretion of the Court, and we submit that in a case of this kind five experts on patent matters far exceeds anything that any court has ever exercised its discretion in permitting. For that reason we object to this as an unnecessary burden upon the defendants, an unnecessary duplication of the record, and a perversion that defeats the true purposes in a hearing of this kind. This subject matter on which the witness is now apparently going to be interrogated about is an exact duplicate of the testimony of the last witness on the stand. Now, that is completely beyond the normal and proper scope of expert testimony, and we object to it on that ground.

Mr. Geisler: If the Court please, counsel misinterprets entirely the nature of what an expert witness is. There are two kinds of expert witnesses, one with regard to plain mechanics, whether the device which is involved can readily be changed or cannot be readily changed with respect to some other device which the defense sets up; and one which in-

(Testimony of William Howard Paul.)

interprets patents. We [681] have not so far called a single witness to interpret a patent, viewed from a mechanical matter,—just as much so as Mr. Grab was called on there to interpret a patent. If there was any patent expert in the case, surely Mr. Grab comes within that category.

Now, in the matter of discretion of the Court, I will state that this witness will corroborate substantially the testimony given by the preceding witness, Mr. Dickson.

Mr. Fryer: Even conceding everything counsel has stated, our objection will still be made on the same ground, but we cannot concede the statements made, and we believe the evidence refutes the statements he has made concerning the nature of the testimony of previous witnesses, and we object to the testimony as not relevant to this cause, for the reasons previously stated.

The Master: The objection will be overruled.

Mr. Geisler: Please read the question, Mr. Reporter.

(The question was thereupon read.)

A. I have.

Q. (By Mr. Geisler) State whether or not you are familiar with the nature of the device described by the patent?      A. Yes, I am.

Q. State whether or not the Carr patent embodies a load lift and an automatic control for the same comprising automatic means for limiting the



(Testimony of William Howard Paul.)

movement of lift in either direction and applying a brake simultaneously.

Mr. Fryer: That is objected to as being grossly leading and putting into the mouth of the witness the words that counsel would like him to use in his answer. If this same sort of examination is to be proceeded with the witness should be allowed to state what he finds in the patent and without it being stated by counsel what he finds.

The Master: Overruled.

Mr. Geisler: If Your Honor please,— [682]

The Master: Overruled. Unnecessary—overruled.

(The question was thereupon read.)

A. It does.

Q. (By Mr. Geisler) State what if any experience you have had with lumber carriers of the straddle type?

A. My experience with—my direct experience with straddle type lumber carriers consists of one summer's work, three months, with the Dallas Machine & Locomotive Works, Dallas, Oregon, as a designing draftsman. I have, of course, seen them operate in lumber yards.

Q. State whether or not, in your opinion, lumber carriers of the straddle type and elevator trucks or wheel-mounted hoists of the Carr type belong to the same machine classification?

(Testimony of William Howard Paul.)

Mr. Fryer: We object to that on the ground that no proper foundation has been laid for an opinion on that subject.

Mr. Geisler: The witness is an instructor at the College here, Assistant Professor of Machinery.

The Master: Well, I think that perhaps you had better qualify him a little further as to his knowledge of the classifications of machines and machinery. I shall sustain the objection as the record now stands.

Q. (By Mr. Geisler) Are you familiar with the classifications— State whether or not you are familiar with the classifications of machinery?

A. Yes; in engineering work we have a good deal to do with the classification of all types of machinery, including such things as boilers, engines, and so on.

Mr. Geisler: I ask now that my question now be repeated for further ruling of the Court.

Mr. Fryer: We renew the objection, if Your Honor please, on the same grounds.

The Master: I will permit him to answer. Your objection will be overruled.

Mr. Geisler: Would the reporter please read the question? [683]

The Reporter: (Reading): "State whether or not, in your opinion, lumber carriers of the straddle type and elevator trucks or wheel-mounted hoists of

(Testimony of William Howard Paul.)

the Carr type belong to the same machine classification?"

A. I consider these two types of machines in a different machine classification.

Q. Would the witness please be shown Plaintiff's Exhibit Number 2 of the patent in suit. State whether or not you are familiar with that patent?

A. Yes, I am.

Q. I call your attention to Figure 3 of this patent, and to the part marked 65 in Figure 3, also to the part marked 66, and connected operating parts.

A. Yes.

Q. Please state what the part 65 is and its function?

A. The part 65 is the lower limit stop on the rack bar—I might say, lower limit stop positioned at the upper end of the rack bar.

Q. What is the specific construction of that part 65?

A. The leader here points to the screw——

Q. Figure 3,—I beg your pardon.

A. Are we to consider this assembly consisting of the screw, the lock nut and the arm fastened to the rack bar?

Q. You may describe the assembly as you see it and its operative purpose.

A. I believe it is the intention of the patent to show that assembly, the screw, the lock nut on the screw and the arm fastened to the rack bar.

(Testimony of William Howard Paul.)

Q. What arm do you refer to?

A. Arm 65.

Q. State whether or not, in your opinion, there would be any problem involved in placing of a similar stop for controlling the upward movement of the load lifting means? [684]

A. No, the suggestion is there for an upper limit stop. It is not shown on the drawing as being back of the frame member.

Mr. Geisler: You may cross examine.

Mr. Fryer: We stand on our objection to the testimony of this witness and for that reason are not going to waive it by cross examination.

The Master: That is all.

(Witness excused)

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The Master: Any further testimony?

Mr. Geisler: No, Your Honor, we rest. [685]

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EXCERPTS FROM FINAL ARGUMENT OF  
MR. FRYER, ATTORNEY FOR DEFEND-  
ANTS.

(The following matter down to end of Statement of Evidence was put in by Defendants.)

Mr. Fryer: Before presenting the matters which we wish to urge upon Your Honor in behalf of the defendants I feel it incumbent upon me to dispel at the beginning whatever impressions may have been



created by the contention of the plaintiff that the defendants here are bound by solemn admission in the pleadings. I am somewhat disturbed by that contention. It would disturb me greatly to feel that the defendants in this cause have been so far misrepresented by Mr. Flegel and Mr. Aurich and myself that we have come in here and with all the care and attention that we could devote to the pleadings in this case have made a solemn admission admitting the act which the bill of complaint accuses us of committing. It may be that we are so remiss in our duties, I don't know. If we are, then I certainly apply to the Court for the exercise of its settled power or discretion to relieve us from any such inadvertence and to grant us leave to make whatever amendments are necessary in our pleadings to save the defendants from such culpable negligence on the part of their counsel. However, I think that we may not be required to have such indulgence on the part of the Court, because a very brief reading of the pleadings will indicate that they do not need any such amendment to avoid the effect which counsel for plaintiff seeks to place upon them.

In the first place, the pleadings referred to are not sworn statements in the cause. They are mere pleadings signed by counsel, not signed by the parties personally and not under oath.

The admission which I refer to is the one which counsel seeks to bind in connection with the allega-

tions pertaining to the defense of laches. The contention, broadly, of the plaintiff [686] seems to be that if these defendants are to set up the defense of laches it must by force of that position admit commission of the act complained of for a long period of time. That seems to be the underlying theory of his idea which enables counsel to see in these simple and plain pleadings admission of infringement. Well, of course, the fundamental idea underlying that premise is completely erroneous. We do not see anywhere in our pleadings, and we do not contend in this cause, that we have used the combination of the claim in suit for the long period of years which give rise to the defense of laches. In this case the pleadings on behalf of the plaintiff come in and say to us, "We accuse you of using this chair because that chair is covered by our patent." Our pleadings and our position before this court is simply this: "We do not for a moment admit that that chair is covered by your patent, but we do insist that we have used this chair for a long period of years with your knowledge and without protest on your part, and if it does come within the claims of your patent then your claim is barred." Now, that is our position, and that is the position which our pleadings state, as I shall show your Honor very briefly.

Now, in this bill of particulars, which supposedly is a record admission of the act complained of, we were called upon to give further particulars with

respect to the allegation of laches in the answer. The paragraph which counsel seizes upon appears on page 2, under the heading "IX(b), First Paragraph." Now, as a mere matter of grammar and rhetoric that paragraph is not susceptible to the interpretation placed upon it by counsel. It reads as follows:

"The failure of plaintiff and its predecessors, with full knowledge of the facts, to assert any rights in the patent in suit against defendants'"—note the plural—"defendants' carrier or others substantially identical therewith for more than [687] six years prior to suit."

Now, counsel insists that "therewith" can only mean and refer to the invention of the patent in suit, whereas the plain grammar of the language indicates, by reason of the rule that a word like "therewith" must modify the subject closest preceding it, that "therewith" modifies "defendants' carrier" and not anything in connection with the plaintiff's patent in suit. In other words, that was an assertion on the part of the defendants to this effect, that the plaintiff and its predecessors had full knowledge of the particular machines of the defendants which the plaintiff contends infringe his patent. Now, that is no admission that those machines do infringe, and that is an assertion that the plaintiff knew about the machines which he now accuses for a long period of time. And it says that the plaintiff did so with full knowledge of the facts,



he failed to assert any rights under the patent in suit against these accused carriers of defendants or against carriers substantially identical with those accused carriers of the defendants, meaning thereby the other carriers in the trade made by the public at large for many years having the identical construction of the carriers of the defendants said to be an infringement. Now, I think that that language is as plain as it can be in accordance with the ordinary rules of grammatical construction, but if there is any occult meaning in it which is not apparent to the minds of the counsel for defendants, why, then we humbly beg leave of the Court to amend that language and make it as plain as may be necessary to express its obvious intent.

Now, another paragraph which is relied upon as indicating admission of the act complained of is the following one on the same page, and the answer is the same to that. The next paragraph, entitled "IX(b), Second Paragraph", on page 2 of the Bill of Particulars, says: [688]

"The defendant Willamette-Hyster Company and its predecessors in interest in Portland, Oregon, ever since 1924 has expended large sums of money for plant equipment, materials, labor and development work in the manufacture and sale of the carriers alleged to infringe."

Well, now, is there anything in that language that asserts that for that period of time the defendants' carriers have been infringing carriers? I must con-



fess that my knowledge of the English language fails me in importing any such meaning in that language, but again if it does have any meaning not apparent from the face of this document then the defendants certainly ask leave that it be amended and made as clear as may be necessary to clearly indicate that obviously intended meaning.

The Master: Well, upon the matter of any amendment, Mr. Fryer, as I understand the rule, that all applications for amendment must be made to the Court,—the Master has no power to permit any.

Mr. Fryer: I believe that there is law to that effect. I also believe that there are cases in which the master has made amendments. But, in any event, our request is made both to the Master and to the District Court.

The Master: Very well. [689]

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[Title of District Court and Cause.]

#### STIPULATION AS TO RECORD ON APPEAL

It is hereby stipulated that the foregoing Transcript contains all those portions of the Reporter's Transcript of the Evidence, specifically designated by Plaintiff—Appellant, and by Defendants—Appellees, respectively, as the portions to be contained in the Record of Plaintiff's Appeal from the Final Decree herein, and that the said specific Designa-

tions by the parties of the Transcript of the Evidence may be omitted from the Transcript.

Dated October 16th, 1939.

T. J. GEISLER

Attorney of Plaintiff,

Appellant.

REYNOLDS, FLEGEL & SMITH

Attorneys for Defendants,

Appellees.

[Endorsed]: Filed Oct. 16, 1939. [690]

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United States of America

District of Oregon—ss.

#### CLERK'S CERTIFICATE

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 696 inclusive, constitute the transcript of record upon the appeal from a Decree of said court in a cause therein numbered E-9581, in which Dallas Machine & Locomotive Works, Inc., a corporation, is plaintiff and appellant, and Willamette-Hyster Company, a corporation, and Clark & Wilson Lumber Company, a corporation, are defendants and appellees; that said transcript has been prepared by me in accordance with the amended designation of contents of the record on appeal filed by the appel-

lant, in accordance with the rules of Court and stipulation of the parties; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appear of record and on file at my office and in my custody.

I further certify that the cost of comparing and certifying the within transcript is \$135.35 and that the same has been paid by said appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 25th day of October, 1939.

[Seal]

G. H. MARSH,

Clerk. [697]

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[Endorsed]: No. 9342. United States Circuit Court of Appeals for the Ninth Circuit. Dallas Machine & Locomotive Works, Inc., a corporation, Appellant, vs. Willamette-Hyster Company, a corporation, and Clark & Wilson Lumber Company, a corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed, October 27, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 9342

DALLAS MACHINE & LOCOMOTIVE WORKS,  
INC., a corporation,

Appellant, (Plaintiff)

vs.

WILLAMETTE-HYSTER COMPANY, INC., a  
corporation, and CLARK & WILSON LUM-  
BER COMPANY, a corporation,

Appellees, (Defendants)

Appeal from Equity Cause No. 9581, from United  
States District Court, District of Oregon

STATEMENT OF POINTS ON WHICH  
APPELLANT WILL RELY

The above-named appellant in compliance with  
Rule 19 of the Rules of the above-entitled Court,  
hereby makes the following statement of Points on  
which Appellant will Rely on its Appeal:

With regard to facts found:

1. Error of the District Court in failing to sus-  
tain plaintiff's exceptions to the Master's Report  
herein.

2. The District Court's 6th, 7th, 8th, 13th, 14th,  
17th, 18th, 19th, 22nd, 23rd, 28th, 29th, 31st, 32nd,  
and 33rd findings of fact, are and each of them is



erroneous, because not supported by, but contrary to the evidence in this case.

3. The District Court erred in that portion of its 11th finding of fact stating, "The only material difference in structure between that shown in Letters Patent No. 1,457,025 and the Nicholson machine is that in the latter the frame containing the load-lifting means is at the front end of the carrier, whereas, in the patent in suit the load-lifting means is mounted between the wheels", because not supported by, but contrary to the evidence in the case.

4. The District Court erred in that part of its 12th finding of fact stating that the operation of the load-lifting means of defendants' carriers asserted to infringe the patent in suit are similar to the teachings of the patent to French et al, No. 1,360,917, issued November 30, 1920, because such finding is not sustained by, but contrary to the evidence in the case.

5. The District Court erred in failing to find that there is a functional and patentable difference between the combination described by claim 4 of the patent in suit—whereby the operation of the four-point, independent, load-lifting means of a straddle-type carrier are rendered positive and uniform, and the devices employed for operating a platform lift, used in elevator and end-lift truck constructions.

6. The District Court erred in failing to find that the evidence in this case does not show antici-

pation of the combination described by claim 4 of the patent in suit.

7. Error in the finding of the District Court that the plaintiff discontinued the manufacture of its rack and pinion straddle-type carriers until 1935; the evidence showing that while the sale of these carriers was temporarily discontinued by plaintiff, and plaintiff manufactured instead for a time, hydraulic lift straddle-type carriers (on which plaintiff also has a patent) in the belief that the latter was superior in operation, which belief, however, was not substantiated in actual practice, and plaintiff resumed the sale of its mechanical lift straddle-type carriers described by the patent in suit, the early part of 1929.

With regard to the District Court's Conclusions of Law:

8. The District Court erred in its conclusions of law numbered 1 to 13 inclusive and each thereof, because not sustained by, but contrary to the evidence in the case.

9. The District Court erred in finding as a conclusion of law that the association of elements composing the combination defined by claim 4 of the patent in suit was a mere aggregation, and does not constitute a patentable combination.

10. The District Court erred in failing to find as a conclusion of law, that anticipation of the combination described of Claim 4 of the patent in suit was not made out, and that said claim is valid.

11. The Court erred in failing to find as a conclusion of law that since the combination described by Claim 4 of the patent in suit contains a new element, viz., load-lifting means which lift the load at the four, independent points of a straddle-type carrier, positively and uniformly, (the load-lifting element of prior straddle-type carriers being defective because not operating positively nor uniformly), it is immaterial as to the patentable novelty of said combination that it included other old elements, by which the positive and uniform movement of the load, up or down, is limited.

12. The District Court erred in failing to find as a conclusion of law that all the prior patents relied on by defendant as anticipating the invention defined by Claim 4 of the patent in suit are the same in principle of operation as the patent to Carr, No. 1,407,024, which patent was cited and considered by the Examiner of the Patent Office in passing on, and allowing the application for the patent in suit, as shown by the File Wrapper thereof; that the defendants had the burden of overcoming the presumption of correctness of the judgment of the Patent Office and the validity of the patent in suit issued in accordance therewith, but defendants failed to sustain this burden.

13. The District Court erred in failing to find as a conclusion of law that the combination of the load-lifting devices and automatic control thereof employed in the straddle-type carriers and manu-

factured and sold by defendant, Willamette-Hyster Company, and used by the defendant Clark-Wilson Lumber Company, are in principle of operation and result obtained identical with the combination set forth by claim 4 of the patent in suit, and constitute an infringement thereof.

14. Error in the District Court's conclusion, (stated in its opinion herein) that "neither the rack and pinion nor the four-point positive lift *is* specified in claim 4 is an essential of the particular combination, because contrary to the evidence in the case.

15. Error of the District Court in failing to find as a conclusion of law, that the combination defined by claim 4 of the Patent in Suit must be construed in connection with the explanation contained in the Specification of the patent, and that when so construed, it is obvious that the invention defined by claim 4 of the patent in suit does not relate to any type of self-propelling carriers, but relates to and designates specifically a straddle-type lumber carrier, "having four lifting points that lift positively and in unison", as stated in the introduction of the patent in suit.

16. Error of the Court in failing to find that there is no proof in this case that the delay of plaintiff in bringing suit on its patent was prejudicial to the defendant Willamette-Hyster Company or to defendant Clark & Wilson Lumber Company, in any way, and therefore defendants' plea of laches fails.



17. The District Court erred in failing to find as a conclusion of law that mere proof of delay of plaintiff in bringing suit on its patent against the defendant Willamette-Hyster Company who had direct knowledge thereof and infringe the same in spite of such knowledge, unaccompanied by proof of some injury sustained or disadvantage suffered by plaintiff by failure to bring suit earlier, does not establish laches.

18. Error of the District Court in failing to find as a conclusion of law that from defendant Willamette-Hyster Company's own statement that it had sold, up to the date of the trial of this cause, 300 straddle-type carriers alleged to infringe, and for which this defendant received about (\$2,000,-000.00), it must be presumed that said sales netted a profit to this defendant.

19. Error of the District Court in holding (as stated in its opinion) "That there are three parties concerned in a patent suit, the patentee, the alleged infringer and the public. In order to promote invention it is proper to grant a monopoly. It is however, in the interest of the public that as much of the art as possible be released from monopolistic control. While the characteristic of the patent is such that it is possible to lock up new developments, damage occurs to the public if another person is permitted over a series of years to place devices upon the market, while a patentee sits idly by and takes no action. Sufficient damage is here shown so that the doctrine of laches is applicable".

20. Error of the Court in failing to find as a conclusion of law that plaintiff is entitled to a decree for injunction and accounting against both defendants.

21. Error of the Court in denying the plaintiff all relief in the premises.

And appellant hereby designates the entire Transcript of Record, as certified by the Clerk of the United States District Court for the District of Oregon herein to the above-entitled court, as necessary to be printed for the consideration of said Appeal, except the following papers which are to be omitted, viz.:

1. Omit printing the paper No. 15 designated in "Appellant's Amended Designation of what shall be contained in the Record on Appeal", such paper entitled "Plaintiff's Objections to Proposed Findings and Conclusions of Law submitted by the Defendants";

2. Also omit printing paper No. 16, in said designation, such paper entitled "Plaintiff's Proposed Findings of Fact and Conclusions of Law which the Court refused to allow"; because such papers are superseded by the above Statement of Points.

3. Also omit printing Plaintiff's Exhibit 12, "Assignment of Patent in Suit to Plaintiff", and in lieu thereof, print the following Abstract:

Assignment Carl F. Gerlinger to Dallas Machine & Locomotive Works, Inc., dated July 2, 1928.

Patents Nos. 1,422,958 date of issue July 18, 1922  
1,457,025 “ “ “ May 29, 1923  
1,480,257 “ “ “ Jan. 8, 1924  
1,609,018 “ “ “ Nov. 30, 1926  
1,618,330 “ “ “ Feb. 22, 1927

Recorded, Transfers of Patents, U. S. Patent  
Office, July 6, 1928, Liber N1-35, Page 43.

4. Also omit printing Plaintiff's Exhibits 49 and 50, being copies of mesne Assignments of Grab Patent to the Willamette-Hyster Company, and in lieu thereof, print the following abstracts:

Exhibit 49. Assignment by Gustav A. Grab to Willamette Iron & Steel Works, dated August 31, 1927 of Lifting Mechanism for Traversing Hoists, described in the specification executed July 2, 1927, filed July 23, 1927, Ser. No. 207,873 renewed under Ser. No. 455,927, filed May 26, 1930.

Recorded, Transfers of Patents, U. S. Patent  
Office, November 30, 1931, Liber V-150,  
Page 661.

Exhibit 50. Assignment by Willamette Iron & Steel Works to Willamette-Ersted Company, dated March 29, 1929, of Lifting Mechanism for Traversing Hoists described in Specification filed July 23, 1927, Ser. No. 207,873.

Recorded, Transfers of Patents, U. S. Patent  
Office, November 30, 1931, Liber V-150,  
Page 662.

The directions with regard to omission of above listed papers 3 and 4, and printing of said Abstracts in place thereof is in accordance with the Stipulation of the parties with regard to the Exhibits.

5. Also omit printing "Appellees' Designation of Additional Portions of the Record Proceedings and Evidence to be included in the Record on Appeal", since this designation is covered by "Appellant's Amended Designation of what shall be contained in the Record on Appeal".

Dated, Portland, Oregon, October 25th, 1939.

T. J. GEISLER

Attorney for Appellant, (Plaintiff)

District of Oregon,

County of Multnomah—ss.

Due service of the foregoing statement of Points on which Appellant will Rely on Appeal of the above-entitled cause, and Designation of parts of Record to be printed for the consideration of said Appeal, is hereby admitted.

Dated October 25th, 1939.

REYNOLDS, FLEGEL & SMITH

Attorneys for Appellees, (Defendants)

[Endorsed]: Filed November 2, 1939. Paul P. O'Brien, Clerk.



[Title of Circuit Court of Appeals and Cause.]

APPELLEES' DESIGNATION.

Come now the above named Appellees and in compliance with Rule 19 of the Rules of the above entitled court hereby designate additional parts of the record which they think material, to-wit:

1. That all exhibits marked with an asterisk or star in that certain stipulation described as "a Stipulation to transmit the original exhibits to the Circuit Court of Appeals", at Page 202 of the Transcript of Record on Appeal in the above entitled cause, which stipulation, filed October 18, 1939, is set forth at Pages 203 to 208\* inclusive, of said Transcript, are regarded as material by both the above named appellant and the appellees and should be reproduced or set forth in the printed record herein in accordance with said stipulation, provided, however, that the abstracts of plaintiff's exhibits 12, 49, and 50 set forth in said stipulation and in appellant's designation of papers necessary to be printed for the consideration of the appeal, may be placed in said printed record in lieu of full copies of said exhibits; and provided further that in so far as it be acceptable to the above entitled court, the twelve copies of defendants' Exhibit 77 which were furnished the appellant in accordance with said stipulation, may be inserted in

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\*See pages 167 to 176 inclusive of this Printed Record.

the printed record in lieu of reproducing said exhibit, and if not acceptable to said court, then that said Exhibit 77 be reproduced in the printed record in the above entitled appeal.

That it was and is the mutual understanding of said appellees and of said appellant that said exhibits marked with an asterisk or star in said stipulation be so copied or set forth in said printed record and the same are referred to here solely by way of assuring said appellees that the same will be done.

2. That this additional Designation is regarded as material by said appellees and should be included in the printed record herein.

Dated at Portland, Oregon, November 1, 1939.

AUSTIN F. FLEGEL, Jr.,

PHILIP A. JOES

of Attorneys for Appellees  
(Defendants).

Due and legal service of the foregoing, by receipt of a duly certified copy thereof, as required by law is hereby accepted in Multnomah County, Oregon, on this 1st day of November, 1939.

T. J. GEISLER,

Attorney for Appellant  
(Plaintiff).

[Endorsed]: Filed November 2, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION THAT CERTAIN EXHIBITS  
BE OMITTED FROM THE PRINTED  
RECORD.

It Is Hereby Stipulated by the above named Appellant and Appellees that an order may be entered in the above entitled court and cause authorizing the Clerk of said court not to cause to be reproduced in the printed record of this cause on appeal the following exhibits, heretofore stipulated and designated by the parties hereto for reproduction in the printed record on appeal, to-wit:

Complainant's exhibits 26, 27, 33, and 48 and

Respondents' exhibits 25, 58, 60, 63, 65, 67, and 70, provided however, that the aforesaid exhibits, and each of them, be available in original form for consideration by the above entitled court in the appeal of this cause, and provided further that in all other respects the stipulations and designations of the parties, relating to exhibits, remain in full force and effect.

Dated December 6, 1939.

T. J. GEISLER,

Attorney for Appellant

AUSTIN F. FLEGEL, Jr. and

PHILIP A. JOSS,

of Attorneys for Appellees.

[Endorsed]: Filed Dec. 9, 1939. Paul P. O'Brien,  
Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER AUTHORIZING CLERK TO OMIT  
CERTAIN EXHIBITS FROM THE  
PRINTED RECORD.

Based on the stipulation of the parties on file herein in the above entitled cause, It Is Now Hereby Ordered that the Clerk of this court be and he is hereby authorized to omit from the printed record of this cause on appeal the following exhibits, heretofore stipulated and designated by the above named parties for reproduction in the printed record on appeal, to-wit:

Complainant's exhibits 26, 27, 33, and 48 and

Respondents' exhibits 25, 58, 60, 63, 65, 67, and 70, provided however, that the aforesaid exhibits, and each of them, be available in original form for consideration by this court in the appeal of this cause, and provided further that in all other respects the stipulations and designations of the parties herein, relating to exhibits, shall remain in full force and effect.

Dated this 9th day of December, 1939.

CURTIS D. WILBUR,  
Senior United States Circuit Judge.

O. K.

T. J. GEISLER

Atty for Applt

AUSTIN F. FLEGEL, Jr. and

PHILIP A. JOSS

of Attorneys for Appellees

[Endorsed]: Filed Dec. 9, 1939. Paul. P. O'Brien,  
Clerk.



United States  
Circuit Court of Appeals  
For the Ninth Circuit

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DALLAS MACHINE & LOCOMOTIVE  
WORKS, INC., a corporation,  
Appellant,

vs.

WILLAMETTE-HYSTER COMPANY, a cor-  
poration, and CLARK & WILSON LUMBER  
COMPANY, a corporation,  
Appellees.

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**Appellant's Brief**

THEODORE J. GEISLER,  
*Attorney for Appellant.*



## GENERAL OUTLINE

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United States  
Circuit Court of Appeals

For the Ninth Circuit

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DALLAS MACHINE & LOCOMOTIVE  
WORKS, INC., a corporation,

Appellant,

vs.

WILLAMETTE-HYSTER COMPANY, a corporation, and CLARK & WILSON LUMBER  
COMPANY, a corporation,

Appellees.

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Appellant's Brief

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INTRODUCTORY STATEMENT

This suit is brought against Appellees (defendants) for their infringement of the patent granted to Carl F. Gerlinger, May 29, 1923, No. 1457,025, a model of which may be seen in Pl'ff's. Ex. 13 (Tr. 216), on an improvement in Lumber Carrier of the straddle-type. The Appellant (plaintiff) corporation is the assignee of this patent; and the patentee, Mr. Gerlinger, is the president of the plaintiff corporation.

The defenses were:

I. That the invention was anticipated by prior art and the patent claim sued on is invalid;

II. That in order to sustain the claim, at all, it must be narrowed by construction, and when so construed the defendants do not infringe;

III. That the plaintiff's delay in instituting suit on this patent shows it to have been guilty of such laches that it must be barred from all relief.

The statement of the facts, and the argument thereon will be given in the same order.

The trial of the case was referred by the court to the Standing Master who reported in favor of defendants on all three defenses; and the District Court confirmed the Master's report, overruling plaintiff's exceptions.

Appellant's contention is that the proofs refute all of the defenses.

\* \* \* \* \*

(Note: The copies of patents and reproductions of pictorial and other Exhibits are contained in Volume III of the Transcript of Record entitled Book of Exhibits).

\* \* \* \* \*

## THE INVENTION DEALS WITH STRADDLE-TYPE CARRIERS

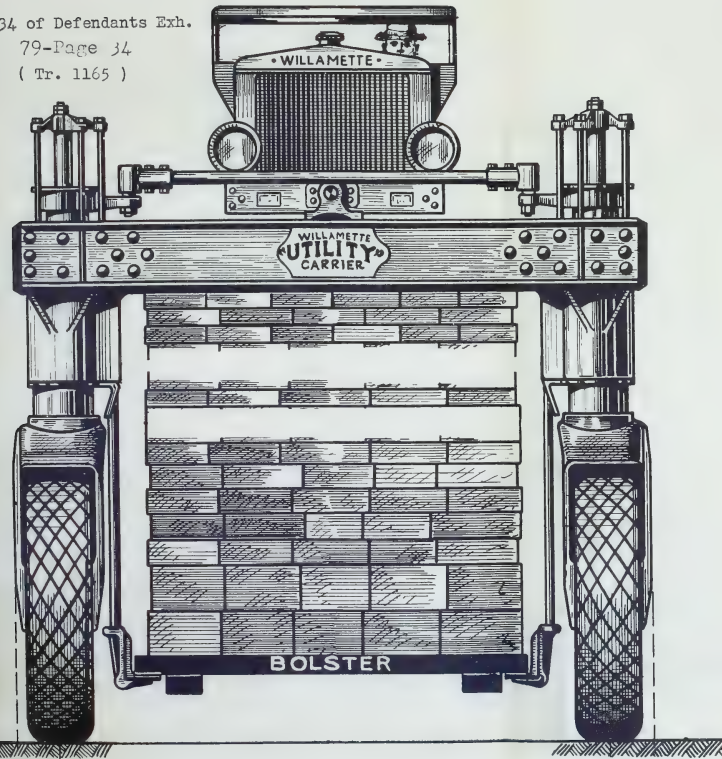
This name designates a carrier having tall, wheel-mounted legs, adapted to *straddle* the load to be picked up and carried.

The operation of these carriers is illustrated by the following drawings, copies of Exhibits in the case.



A schematic end view of a straddle-type  
carrier with load of lumber.

Page 34 of Defendants Exh.  
79-Page 34  
( Tr. 1165 )



Showing operation of straddle-type lumber  
carrier picking up stacked load in lumber  
yard.

*Bolster*



## THE PRIOR ART

The earliest construction of a straddle-type carrier is shown by the patent to H. B. Ross, issued December 16, 1916, No. 1,209,209 on an application filed May 11, 1914; Plaintiff's Exhibit 1-A; also Defendants' Exhibit 78. (See Tr. 1203).

*These straddle-type carriers have a four-point lifting and lowering mechanism including "shoes" that slide in vertical guideways on the inner sides of the four, tall, load-straddling legs of the carrier, and these shoes pick up and carry the load. The load to be picked up is stacked above the ground on a suitable support, usually on "bolsters" as shown in the Exhibits above given, so that the shoes can grasp the ends of the supports and in that way pick up the load.* *The shoes were suspended by four pendent cables, and lifted and lowered by simultaneous winding, or unwinding of the cables.*

*This arrangement was undependable.* The shoes were not operated positively nor uniformly.

Mr. Gerlinger testified: (Tr. 184)—

*"Their shoes are lowered by gravity, and very often splinters get in between the shoe and the guideways and the cable would unwind and the shoe wouldn't lower, and in winter months with snow and ice, it was practically impossible to operate them."*

If the shoes were not properly lowered in unison they could not of course grasp the bolsters on which the load is stacked, and hence could not pick up the load.

The unwinding of a shoe-carrying cable with one of the shoes sticking in its guideway is graphically illustrated by dotted outline in the following drawing, based on Figure 2 of said Ross patent, No. 1,209,209. (Tr. 1203).





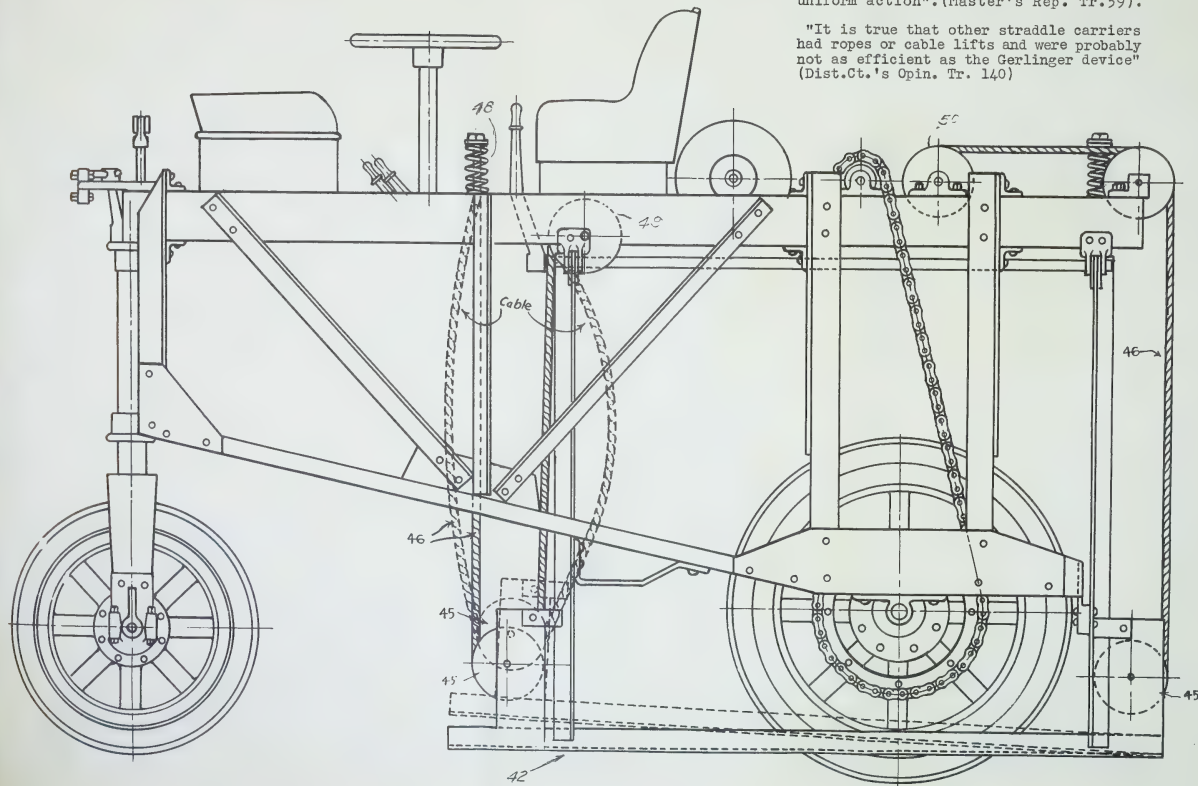
Figure 2 of prior Ross straddle type carrier, Patent No.1,209,209, dated December 19,1916; Pl'ff's.Exh.1-A and Def'g's. Exh.78, ( Tr.1204 ).

- 42 - Lifting shoes
- 45 - Grooved pulleys
- 46 - Cable
- 48 - Spring
- 49 - Guide pulley
- 50 - Drum

"Their shoes are lowered by gravity and very often splinters get in between the shoes and the guideways and the cables would unwind and the shoe wouldn't lower and in winter months with snow and ice it was practically impossible to operate them." ( Gerlingers Testimony,Tr.184 ).

"The cable did not give a positive and uniform action".(Master's Rep. Tr.59).

"It is true that other straddle carriers had ropes or cable lifts and were probably not as efficient as the Gerlinger device" (Dist.Ct.'s Opin. Tr. 140)





In addition to the patent taken out by Ross in December 19, 1916, above referred to, Ross took out a second patent on straddle-type carriers issued July 9, 1918, No. 1,271,947 (Exh. 1-B Tr. 816).

This patent again shows the use of *cable-operated* load-lifting and lowering shoes.

Next, William S. Overlin took out a patent on straddle-type carriers, dated December 31, 1918, No. 1,289,529 (Exh. 1-C, Tr. 826), and Overlin obtained a further patent on straddle-type carriers August 10, 1920, No. 1,349,292, (Exh. 1-D Tr. 838). Both these Overlin patents show the use of *cable-operated* load-lifting and lowering mechanism.

Mr. Gerlinger, observing the inefficiency of the cable-operated load-lifting and lowering mechanism in straddle-type carrier, conceived his improvement. This consisted in eliminating the undependable, cable-operated mechanism and providing in place thereof mechanism which operated *positively and uniformly* at the four points—the legs—of the carrier.

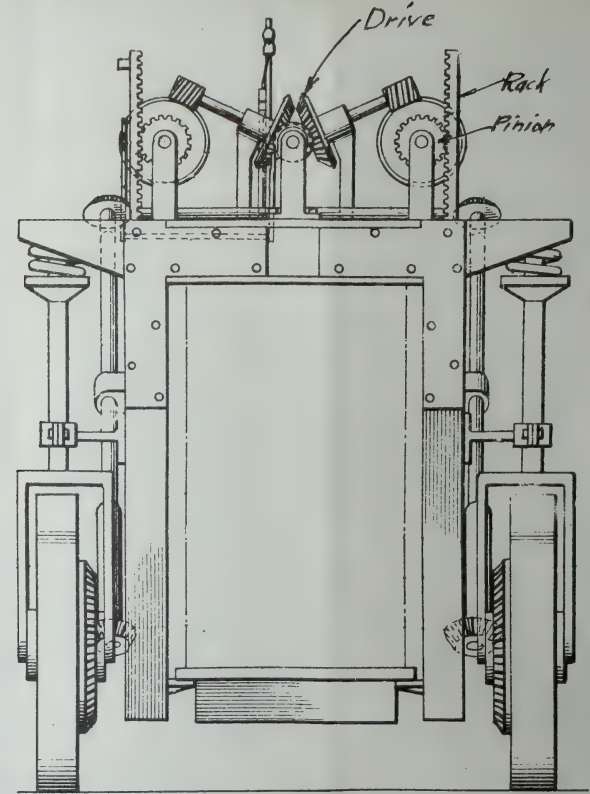
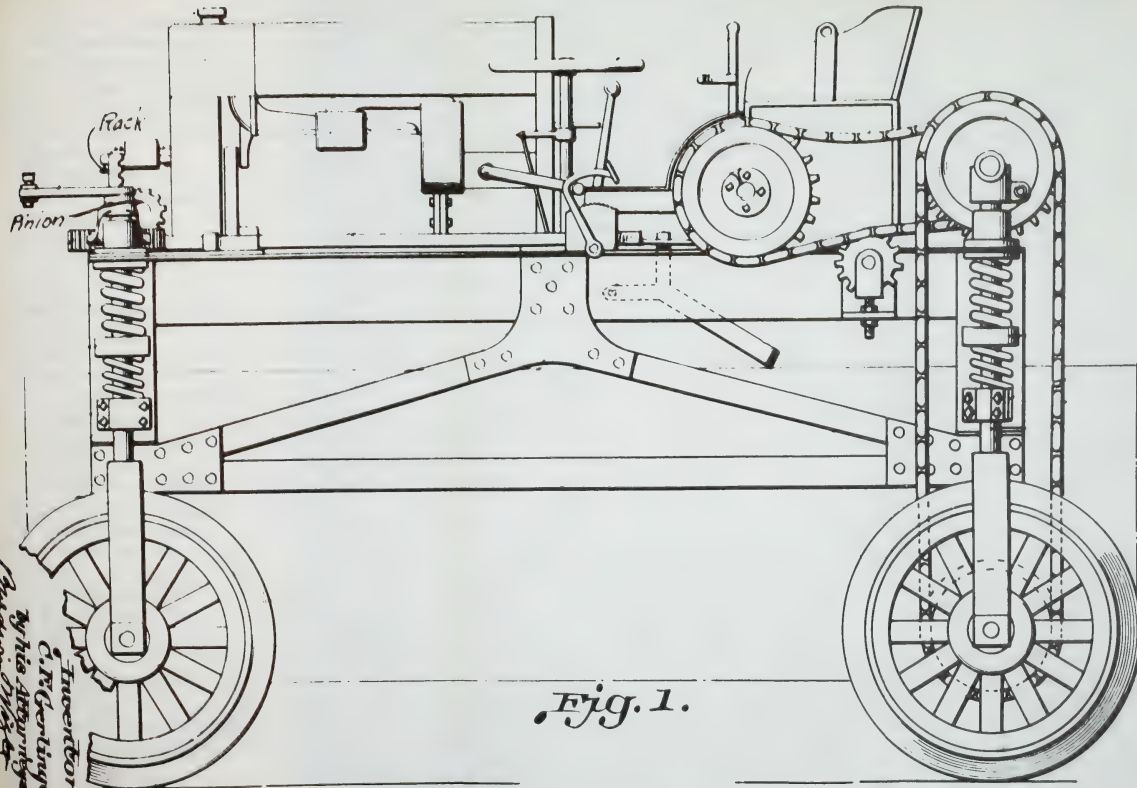
Gerlinger carried his conception into practice by the employment of *rack-and-pinion* mechanism operated by worm gear. This feature, the nucleus of Gerlinger's improvement, is illustrated by the following drawing, being Fig. 1 of the drawings of the patent in suit (No. 1,457,025) and Fig. 5 of Gerlinger's first patent No. 1,422,958, (Pl'ff's. Exh. 1, Tr. 805) co-pending with the application for the patent in suit, and referred to therein, the patent in suit describing a later improvement:





Figure No. 1 of Gerlinger patent in suit, (No. 1,457,025). (Tr.849)

Figure No. 5 of Gerlinger patent No. 1,422,958, dated July 18, 1922, referred to in and upon which the patent in suit was an improvement. (Tr.812)



By his Attorney  
J. H. Gerlinger



Gerlinger's conception of a four-point *positive and uniform* load-lifting and lowering mechanism included his further perception of the need of an *automatic control for limiting the movement of the load in either direction*, so as to prevent injury to the mechanism; and Gerlinger's first patent included this control mechanism (Tr. 185).

In May, 1921, Gerlinger built his first straddle-type Lumber Carrier embodying his improvements as then conceived, which carrier was completed in July, 1921. (Ib. 186)

On August 30, 1921, Gerlinger filed the application for patent on his improvements, as then developed, which application matured into his said first patent, No. 1,422,958, issued July 18, 1922. (Exh. 1)

The introduction of the specification of this earlier patent, stated as Mr. Gerlinger's objectives:—

*"Instead of employing ropes or cable for operating the lifting shoes, I employ shafts and gearing of substantial and reliable construction and which are controlled by clutch mechanism, in turn controlled by suitable levers"* (Specif. 1 line 33), and

*"Automatic devices are employed for stopping the elevating mechanism and for releasing the load when desired. Automatic devices are also employed for stopping the descent of the elevating devices when lowered."*

By reference to Claims 5 and 6 of this patent, it will be seen that Claim 5 describes a combination comprising—

*"lifting shoes, vertically moveable rack bars with which they are connected, operable connections between the rack bars and the engine for both raising and lowering the shoes, and automatic devices for*

*disconnecting the rack bars from the engine when the shoes have been lowered to a predetermined extent."*

And Claim 6 covers a similar combination but described specifically—

*"devices for automatically shifting the gearing (connecting the rack-bars with the engine) to arrest the upward movement of the rack bars when the shoes have been raised to a predetermined position."*

Gerlinger's first straddle-type carrier, completed July, 1921, was tried out in the yard of the Willamette Valley Lumber Company at Dallas, Oregon. In such trial, Gerlinger observed that the load carried by the carrier tended to settle, due to the vibration set up in the travel of the carrier; such settling being perceptible even in running the carrier across the lumber yard (Ib. 187).

Mr. Gerlinger then rebuilt this *first* straddle-type carrier and included a brake in the control element of his load-lifting and lowering mechanism, to hold the load against settling (Tr. 187, 188). This was in September, 1921 (Tr. 189). Mr. Gerlinger's application for his said first patent, No. 1,422,958 had then already been filed, August 30, 1921).

The application for the patent in suit (Exh. 2, Tr. 852) was filed March 30, 1922, and was issued May 29, 1923; thus while Mr. Gerlinger's application for his earlier patent No. 1,422,958, issued July 18, 1922, was still pending.

The specification of the patent in suit states (page 1, line 12) that the invention—

*"is an improvement upon my patent No. 1,422,958, July 18, 1922,"* (referring to Gerlinger's earlier patent.)



The specification further states:

"An object of the invention is to provide an *improved form of lifting device that will have four lifting points that lift positively and in unison.*"

"Another object is to provide a form of *automatic stop for the lifting device that will operate when the limited movement in either direction is reached, and also apply a brake mechanism.*"

Infringement of *Claim 4* alone of this patent is charged. This claim describes a combination composed of the following elements:

"A lumber carrier comprising,

1. a frame,
2. load-lifting means mounted *therein*,
3. means for transmitting motion from a source of power to the load-lifting means comprising a clutch that can be set in neutral position or to cause the load-lifting means to move *in either direction*,
4. means for manually moving the clutch to operative position,
5. automatic means for moving the clutch to neutral position upon a movement of the load-lifting means to a predetermined extent in *either* direction,
6. means for braking the transmitting means whenever the clutch is moved to neutral position."

The Master in his Report recapitulated the facts regarding Mr. Gerlinger's improvements of straddle-type carriers as follows: (Tr. 59)

"These carriers, used originally and principally for the purpose of picking up and transporting

piles of lumber in the carrier stages of development *utilized a cable or chain lift*. Defects were discovered, in that *the cable did not give a positive and uniform lift*. The next method of lifting means adopted was *rackbars and pinions* driven from the power plant of the machine. *Gerlinger claims to have been the originator of this kind of a hoist as adapted to a straddle-type lumber carrier*.

(Further on in his Report (Tr. 76), the Master said,

“2-a. *Load-lifting means mounted therein, having four lifting points that lift positively and in unison (which he may well have been the first to conceive.)*”)

“In use it was found that, while the lift was positive and uniform, considerable care was required on the part of the operator manually to disconnect the power from the lifting mechanism when the load had reached the proper height, and that in the course of travel, vibration of the machine and other factors tended to cause the mechanism to settle to such an extent that sufficient clearance did not exist between the bottom of the load and the ground.”

“The problem to which the patentee claims to have addressed himself was the development of means whereby, when the load was lifted, the hoisting mechanism would be stopped automatically at the desired point, the power disconnected therefrom, and the brake applied so as to prevent the settling of the load; and, further that when the

hoisting machine was reversed for the purpose of picking up a load the action would be automatically stopped at a desired point, the power again disconnected and the brake applied; all this without action on the part of the operator."

In Gerlinger's first-built carrier, the means for limiting the down movement of the load-carrying shoes were actuated by the movement of the rack-bars, while the devices employed for limiting the up-movement of the shoes were arranged to be operated by the load carried by the carrier, consisting of a hinged bar 67 (see Fig. 3 of patent drawing) which was contacted by the load carried when lifted to a predetermined height.

The first *rebuilt* improved straddle-type carrier was sold by plaintiff to the Willamette Valley Lumber Company October, 1921 (Ib. 192, 193.) But this construction was not found practical.

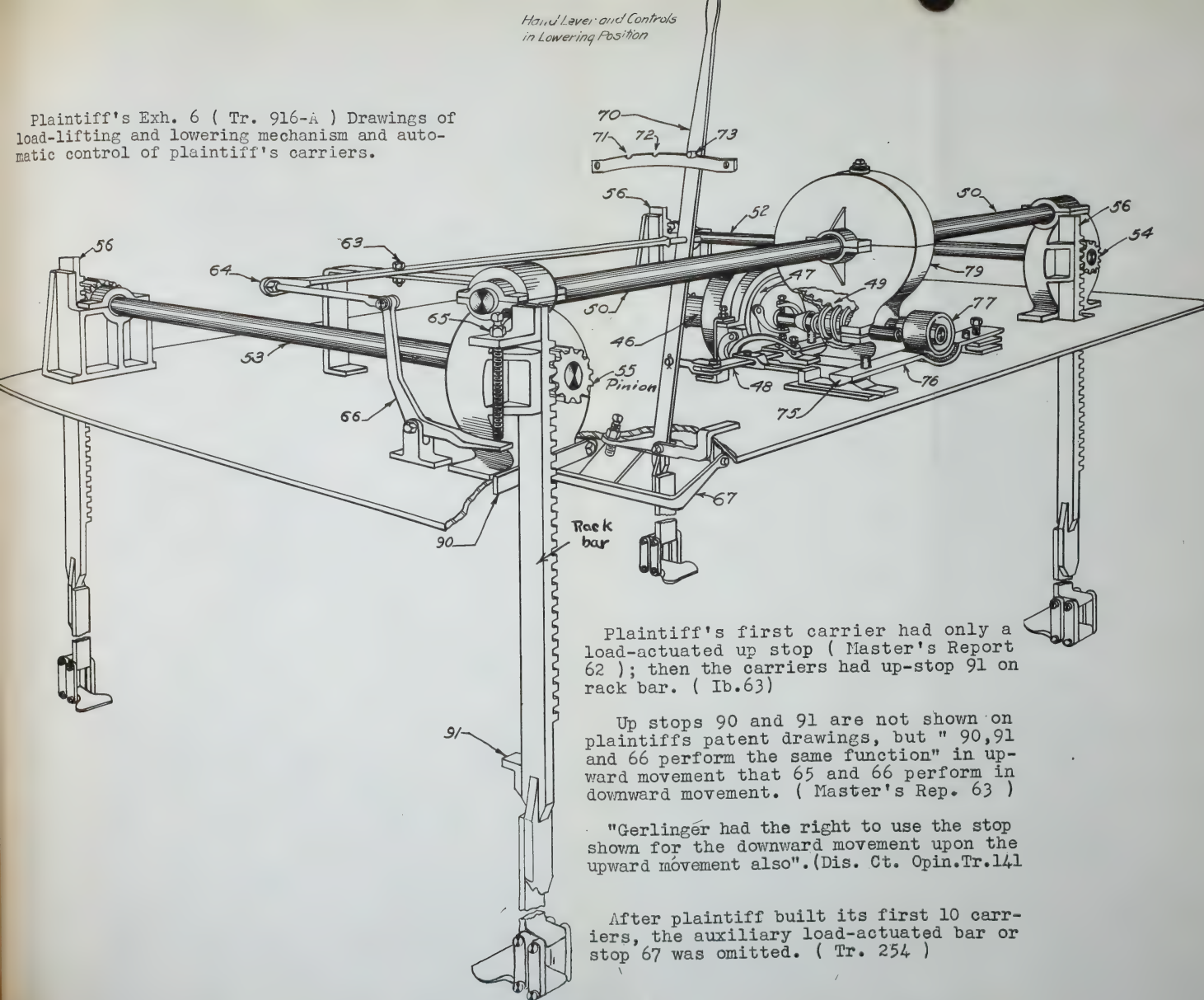
The plaintiff then built three more of these carriers; the second and third carrier being completed and sold about February 1, 1922, to Cobb-Mitchell at Valsetz, Oregon (Tr. 398, 399) and the fourth about April 1, 1922. In each of the later carriers the *devices controlling the up-movement of the load were rearranged so as to be operated by the up-movement of the rack bars, in just the same manner as by their down movement* (Tr. 195, 198).

A drawing of the load-lifting and lowering devices and automatic control contained in plaintiff's No. 2 and 3, and the succeeding 7 carriers is shown by Exh. No. 6 (Tr. 916-A), a copy of which drawing is here given.



Hand Lever and Controls  
in Lowering Position

Plaintiff's Exh. 6 ( Tr. 916-A ) Drawings of  
load-lifting and lowering mechanism and auto-  
matic control of plaintiff's carriers.



Plaintiff's first carrier had only a  
load-actuated up stop ( Master's Report  
62 ); then the carriers had up-stop 91 on  
rack bar. ( Ib.63 )

Up stops 90 and 91 are not shown on  
plaintiff's patent drawings, but " 90,91  
and 66 perform the same function" in up-  
ward movement that 65 and 66 perform in  
downward movement. ( Master's Rep. 63 )

"Gerlinger had the right to use the stop  
shown for the downward movement upon the  
upward movement also".(Dis. Ct. Opin.Tr.141

After plaintiff built its first 10 carr-  
iers, the auxiliary load-actuated bar or  
stop 67 was omitted. ( Tr. 254 )





The drawing, Exh. 6 was made by Henry Noel Dimick from a set-up of the load-lifting and lowering devices, and control mechanism, as contained in plaintiff's second, third, and fourth straddle-type carriers.

A photo of this set-up is shown by Pl'ff's. Exh. 31 (Tr. 362).

Explaining Exh. 6, witness Dimick testified:

The driver of the carrier by pulling operating lever 70 towards him engages clutch 47, releases brake-bar 76 from brake wheel 77, and connects the engine to shaft 50, causing the latter to rotate the pinions 55 so as to raise the rack-bars 56. A contact member 91 is fastened on one bar-back; and as the latter is moved up to a predetermined height contact member 91 will engage lever 90 and cause the latter to rock bell-crank 66 so as to throw the lever 70 in the central or neutral notch 72; and bar 48, being connected to operating lever 70, the movement of the latter to neutral position will lift the brake-bar 76 and apply the brake to brake wheel 77.

In order to cause the rack-bars 56 to be moved down, the driver would push operating lever 70 from him, thereby also moving the bar 48 so as to release the brake-bar 76 from brake-wheel 77. The shaft 50 will then be rotated to cause the lowering of the rack bars. In this lowering movement when the predetermined lower level is reached, the set screw 65, fastened to the upper end of the rack-bar above an arm of bell crank 66, will contact and rock the latter, which action, through lever 64, will return operating lever to neutral position, thus disengaging the clutch and applying the brake. (Tr. 370-3)

The Master recapitulating these facts in his Report (Tr. 62) said:—

“The plaintiff and the patentee built one machine containing a load-actuated upward movement stop bar (No. 67). *It had defects which in actual operation became obvious.* If the load was not of sufficient height to engage bar 67 by the time the rack-bars had reached the end of their normal travel, or if the load was not properly distributed on the lift, bar 67 would not operate and the hoist mechanism would be subject to damage, due to upward movement beyond the designed range, thus either stripping the pinion or the rack teeth.

“This the patentee and his assignee corrected by eliminating bar 67 and *placing the upward movement stop on the rack bar.* *Exh. 6 shows the new means* which Gerlinger adopted to govern upward movement. No. 91 on the rack-bar engaged element No. 90 which in turn engaged bell crank No. 66. *The action of Nos. 90, 91 and 66 performed the same function with regard to upward movement of the hoist that Nos. 65 and 66 performed in the downward movement.*” \* \* \*

\* \* \* \* \*

(Note: An error in the Master’s statement in this connection must be called to attention: He said, (Tr. 63)

“Nos. 90 and 91 will not be found in the drawings and specification of the patent, inasmuch as they were adopted *after* the application had been filed”.

In such statement the Master is in error, as above stated, *the carriers Nos. 2 and 3*, having the means

for controlling the *lifting* of the load *rearranged so as to be operated by the movement of the rack bars in the same way as by the lowering of the load, were built in Feb. 1922*, (Tr. 398). The application for the patent in suit was not filed until March 30, 1922.

\* \* \* \* \*

Exh. 6 shows *two* independent devices for controlling the upward movement of the rack-bars, as appears from the following questions the Master asked of witness Dimick, (Tr. 367):—

“Well, if 90, when it makes an upward movement, strikes 91, engaging with the bell crank, then thereby shifting the lever 70 in neutral, what function does 67 play?

A. \* \* \* This mechanism here is provided in order “to protect the lifting mechanism, provided the driver didn’t have a load in the carrier or had a load that wasn’t of sufficient height to come up and strike this lever bar 67 before the racks had reached the limit of their travel, which would be determined by the number of teeth on the rack.”

“The Master: May I ask another question there, Mr. Dimick. Is the relation of 90 to the rack such that when the load is on, a full load, the top of the load would engage 67 before 90 engages 91?

A. A full load would engage 67 before 91 would engage 90.”

Up to 1923 plaintiff built 10 carriers which had the two independent devices controlling the up-movement of the load.

After 1923, no more carriers, were built which had the load-operated control bar 67. (Ib. 227)



In 1923 plaintiff began making hydraulic lift carriers, on which Mr. Gerlinger had also obtained a patent, No. 1,480,257, dated January 8, 1924 (Tr. 228) Defendants' Exh. 14 (Tr. 923). Mr. Gerlinger believed these hydraulic carriers to be superior. (Tr. 233); but they did not prove satisfactory. The piping carrying the fluid through the hydraulically-operated mechanism was "subject to leaks and would leak oil out on the frame and other parts of the machine; it would drip on and damage lumber," and in many instances drivers of these carriers were incompetent to keep these hydraulic carriers operating satisfactorily. (Tr. 389).

In 1928, plaintiff discontinued making hydraulic carriers and resumed making mechanical lift carriers, described by the patent in suit exclusively (Tr. 228). Up to the date of trial, Nov. 23, 1936 (Tr. 178) the plaintiff had sold 95 more of these carriers. They were designated on the books of plaintiff as "RPF"—"Rack-and-pinion lift" as testified by Ballantyne, Secretary-Treasurer of plaintiff (Tr. 400) and shown by plaintiff's sales sheet Exh. 45. (Ib. 483 and 953). The first delivery of the RPF carriers, after plaintiff resumed making them was March 5, 1929, (Tr. 481).

The answer sets up prior invention by G. A. Grab at Portland, Oregon, H. B. Ross at Benton Harbor, Michigan, and Henry Hartwig at Sandy, Oregon, (Tr. 24).

In response to plaintiff's demand for further particulars as to these alleged prior inventors, defendants stated they would not "rely at the trial upon prior invention by G. A. Grab or Henry Hartwig", but alleged prior invention by H. B. Ross at Benton Harbor, Michigan in or about 1919, (Tr. 35). In answer to

plaintiff's interrogatory No. 1, defendants corrected the year of alleged prior invention of H. B. Ross from 1919 to 1921 (Tr. 47). Ross was not called nor his deposition taken. The only evidence introduced by defendants as to Ross was that he sold two straddle-type carriers in principle of operation the same as plaintiff's patent in *September 15, 1923* to defendant Clark & Wilson Lumber Company (Tr. 562).

*The contention of defendants* was that plaintiff's patent is invalid, because elevators or hoists, and front-end lift trucks, also lift and lower the load positively and uniformly, and the prior art in connection with these hoists shows automatic control for the movement of the load up or down, and the application of a brake when the predetermined limit of movement is reached.

*The plaintiff's answer to this contention* is, a platform hoist, stationary or mounted on a truck, is raised and lowered AS A UNIT. In a straddle-type carrier, however, the lifting and lowering force has to be applied at four spaced points, independently, and to obtain efficient action the force must be applied POSITIVELY AND UNIFORMLY at the four points. Without this the load-carrying shoes often stuck in lowering, and the load could not be picked up, as testified by Mr. Gerlinger (Tr. 184).

The defendants, to sustain their contention, pointed to the patent issued to Ross, on straddle-type carrier, December 19, 1916, No. 1,209,209 already referred, (Pl'ff's. Exh. 1-A, which the defendants also introduced as their Exh. 78).

The defendants further introduced *all the patents cited by the Examiner of the Patent Office* in passing on and allowing the application for the patent in suit—

15 in number—, as a group of Exhibits, identified as a whole as Defendants' Exh. 57. (Tr. 573; See Index of Defendants' (Respondents') Exhibits in Volume Viii d for the list of these patents).

Defendants further introduced the following *patents because showing automatic control mechanism, including a brake, as used in Elevators and platform or front-end lift trucks, viz:*

Dingee No. 414,380, dated November 5, 1889, showing a Stationary Elevator or Hoist (Exh. 59, Tr. 620, copy 1104)

Nicholson, No. 1,340,458, dated May 18, 1920, Portable Freight Stacking Elevator (Exh. 62, Tr. 632, copy 1114)

French & Pavey, No. 1,360,917, dated Nov. 30, 1928, Elevating and Conveying Apparatus (Exh. 64, Tr. 644, copy 1122)

Towson & Cochran, No. 1,337,804, dated Apr. 20, 1920, Industrial Truck (Exh. 66, Tr. 656, copy 1130)

Cochran No. 1,260,145, dated Mar. 19, 1918, Industrial Truck (Exh. 68, Tr. 662, copy 1140)

Carr patent No. 1,407,124, dated Feb. 21, 1922, Elevator Truck (Exh. 69, Tr. 665, copy 1152).

The defendants further introduced a working model of the Dingee patent, (Exh. 61, Tr. 627), as illustrating in a general way the operation of the hoists described by the last-mentioned patents.

Drawings of the Dingee patent and of the Carr patents, illustrating their operation are here given.



Fig. 1 of Dingee patent No. 414,380,  
dated November 5, 1889, Elevator, ( Def'ts  
Exh. 59, Tr. 1104 ).

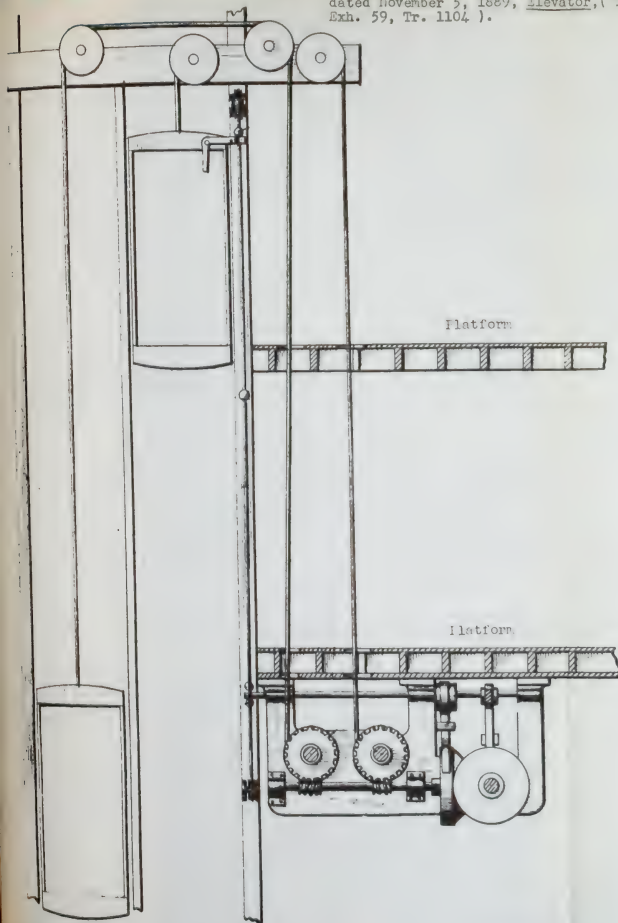
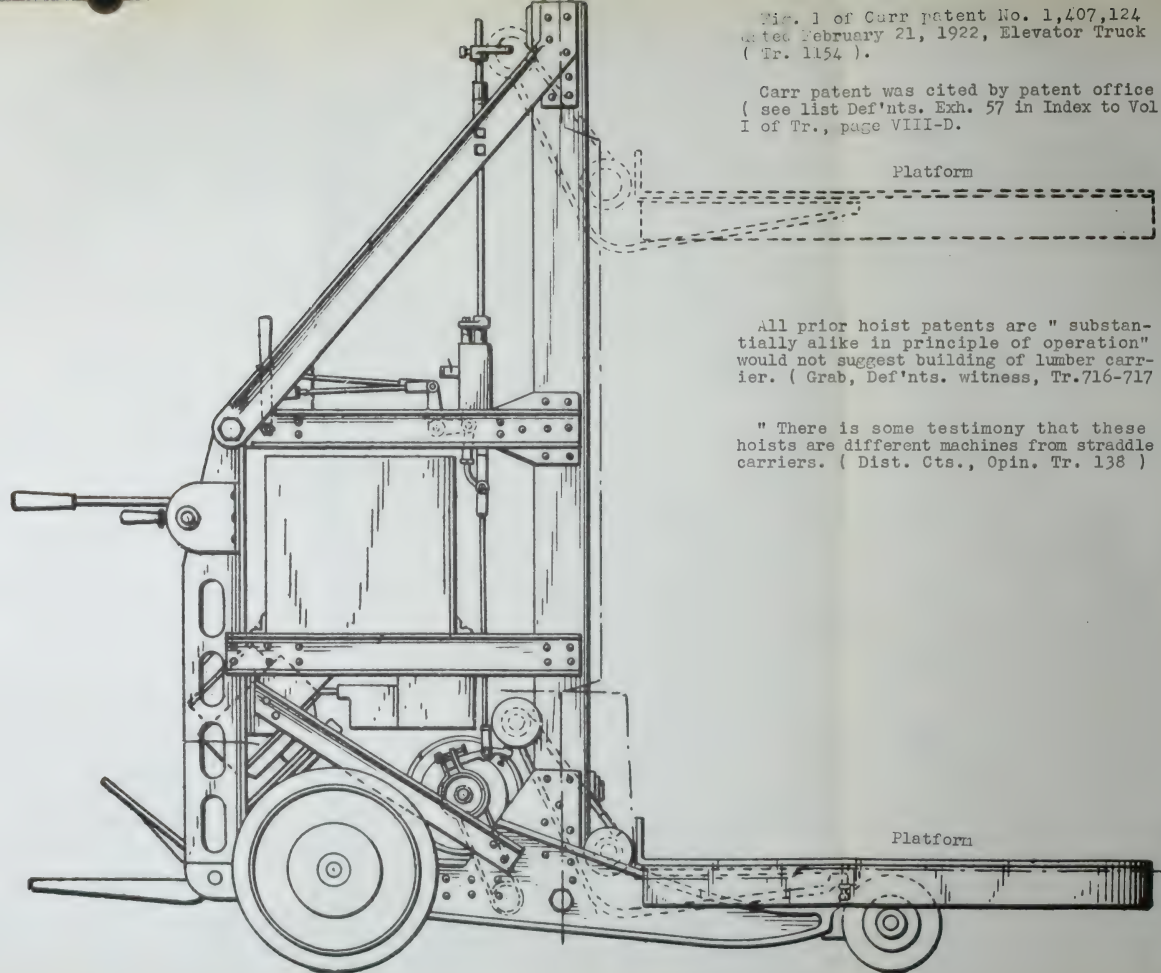


Fig. 1 of Carr patent No. 1,407,124  
dated February 21, 1922, Elevator Truck  
( Tr. 1154 ).

Carr patent was cited by patent office  
( see list Def'ts. Exh. 57 in Index to Vol  
I of Tr., page VIII-D.



All prior hoist patents are " substan-  
tially alike in principle of operation"  
would not suggest building of lumber carr-  
ier. ( Grab, Def'ts. witness, Tr.716-717

" There is some testimony that these  
hoists are different machines from straddle  
carriers. ( Dist. Cts., Opin. Tr. 138 )





The patent to Dingee shows an Elevator and the patent to Carr shows an Elevator Truck.

*The Carr patent, No. 1,407,124, Exh. 69 (see copy in Tr. p. 1152) was among those cited by the Examiner of the Patent Office.*

Concerning these patents, defendants witness, Mr. Grab,—Manager of the Carrier department of defendant, Willamette-Hyster Company (Tr. 575), formerly in the employ of Plaintiff (Tr. 576)—to whom the Master referred in his Report, (Tr. 82, 83) as having “*some feeling of hostility*” toward Mr. Gerlinger, and as being “*a highly interested witness*”——.

on cross-examination said:

“Q. Taking all these patents which we have referred to, Dingee, Def’nts. Exh. 59; Nicholson, Def’nts. Exh. 62; French & Pavey, Def’nts. 64; Towson & Cochran, Def’nts. 66; Cochran, Def’nts. 68; and Carr, Def’nts. 69; *all of them show examples of wheel-mounted hoist and are substantially alike in principles of operation?*

A. Yes.

Q. None of them would suggest the building of a lumber carrier if you did not have a lumber carrier in mind, is that right?

A. No.

Q. If you did not have a lumber carrier in mind, it would not suggest the building of a lumber carrier?

A. No.

Q. *All they might suggest to you is the building of some kind of a truck for lifting the load regardless of what is to be lifted, is that right?*

A. Yes, if I had the building of such a truck in mind. (Tr. 716-717)."

Mr. Grab made the same statements when previously cross-examined as to each of these hoist patents separately.

*John Dickson, master mechanic of the Spokane, Portland & Seattle Railroad, called as an expert by plaintiff testified:— (Tr. 765) That he is familiar with the Carr patent, Def'nts. Exh. 69.*

"Q. You may state whether or not in your opinion, this Carr patent gives any suggestions as to how a straddle-type of lumber carrier with lift controls may be built?

A. I would say it does not.

Q. Have you any reason to advance for your opinion?

A. For one thing, it *lifts only at one end* while a *straddle-type lumber carrier must lift on all four points. \* \* \**

"Q. You may state whether or not in your opinion there is any similarity between a straddle-type lumber carrier and a wheel-mounted elevator?

A. I do not consider there is any similarity.

Q. Now having reference to the devices which are described in the Carr patent for the control in an automatic manner of the load-lifting devices so as to stop them at predetermined elevations in the up or down movement, apply a brake, you may

state whether or not in your opinion the devices which are shown there in the Carr patent could be carried over into the building of a lumber carrier.

A. Well, I would say as they are in here they would have to be changed considerably before they could be used for that purpose. \* \* \*” (Tr. 769-770)

Changes, obviously had to be made in the old straddle-type carrier in order to eliminate the inefficient cable-operated mechanism and put in place thereof, positive mechanism (e.g.) rack bars uniformly actuated at the four independent load-lifting and lowering points, and further to incorporate in this mechanism automatic means controlling the movement of the rack bars, and a brake automatically applied to hold the shoes while at rest.

William H. Paul, Assistant Professor of Mechanics, in Oregon State College, another expert called by plaintiff testified:—That he is familiar with the Carr patents, Def’ts. Exh. 69, and with straddle-type lumber carriers.

“Q. State whether or not you are familiar with the classification of machinery?

A. Yes, in engineering, I have a good deal to do with classification of all types of machinery. \* \* \*

Q. State whether or not in your opinion Lumber Carriers of the straddle-type and elevator trucks or wheel-mounted hoist of the Carr type belong to the same classifications?

A. I consider them two types of machines in a different machine classification.” (Tr. 779-785).



The testimony of the witnesses, however, apparently, did not convince the Master. He gave the question of invention his own speculative analysis. He said in his report,—(Ib. 70)

“The man who conceived the idea of a self-propelled truck equipped with a hoist that would pick up a load *within* the frame members, *displayed inventive genius* of a high order”, (Tr. 70).

But in the improvement of these carriers, so as to render them efficient, the Master could not *see invention*. He said (Tr. 73):—

“The Master, however, can conceive no difference in the problem which would arise in a carrier having four lifting points and one having a lesser number provided positive means of lifting are used. Nor is it clear that any different problem arises when the load is carried within the frame members —(referring to the load-spanning legs of a straddle-type carrier)—from that which exists when the load is carried at the end of the frame members.”

Nevertheless, it is to be noted that Mr. Gerlinger received the tribute of immediate adoption from *H. B. Ross—who took out the earliest patent*—No. 1,209,209, dated Dec. 19, 1916 (copy p. 1903)—to whose cable-operated straddle-type carrier the Master referred as displaying “*inventive genius of a high order*”—. Ross had had the undependable working of the cable-operated mechanism before him for seven years—before Mr. Gerlinger entered the field, (Ross filed his application for patent in 1914, but did not conceive the necessary improvement. In 1923 shortly after the plaintiff’s

patent issued, Ross sold one of his straddle-type carriers to Clark & Wilson Lbr. Co. *reconstructed* to contain the combination described by Claim B, & C, (Tr. 430, page 942).

The plaintiff duly excepted to the statements in the Master's Report with regard to his findings that Claim 4 does not describe a patentable combination. (Tr. 88). But the District Court overruled plaintiff's exceptions and adopted the report of the Master.

In its opinion, the District Court however, stated:

"It is true that other straddle-type carriers had ropes or cable lifts and were probably not as efficient as the Gerlinger device. (Tr. 140).

"The Gerlinger device does contain a *four-point lift positively actuated*. (Tr. 134).

"There is some testimony that *these devices (referring to platform or front-end lifts) are different machines from straddle-type carriers.*" (Tr. 138).

And the District Court's final conclusion was that it is "*inconceivable*" that what Mr. Gerlinger did to improve and render the old cable-lift straddle-type carrier efficient constituted invention. (Tr. 138)

Discussion of this subject will be continued under ARGUMENT, Section I.

## II.

## THE FACTS AS TO INFRINGEMENT.

*The infringement by defendant Willamette-Hyster Company was deliberate.*

Gustav A. Grab, the manager of defendant Willamette-Hyster Company's Carrier Department (Tr. 575) was in the employ of plaintiff during the development of Mr. Gerlinger's improvement in straddle-type carriers. Mr. Grab was discharged January 1, 1926 (Ib. 754). He immediately obtained employment with the Willamette Iron & Steel Company (Master's Report, Tr. 82). The latter corporation sold out its carrier business to Willamette - Ersted Company (Tr. 595)—formerly the corporate name of the defendant Willamette-Hyster Company, in whose employ Grab continued to the date of the trial.

Beginning September, 1926, Grab designed a straddle-type carrier for the Willamette Iron & Steel Company (Ib. 595). No Exhibit showing the construction of a carrier which Grab designed was introduced. He testified that it was substantially the same as shown by the photos defendant's Exhibits 56-A and 56-B (Tr. 595, copies of which will be found in Tr. at pp 1011-1012) which are photos of straddle-type carriers sold by defendant Willamette-Hyster Company to defendant Clark & Wilson Lumber Company about March 17, 1935.

Grab applied for a patent on his design. He filed his application July 23, 1927, substituting this application by another filed May 26, 1930, as shown by the caption

of his patent No. 1,838,939, dated December 29, 1931, plaintiff's Exh. 47 (Tr. 511, a copy of patent will be found at Tr. p. 965).

This patent Grab assigned by mesne assignments to defendant Willamette-Hyster Company. (Tr. 974)

The file wrapper on this patent (Exhibit 51, Tr. 520, copy 974) shows that Grab solicited the following claim:

"8. In a traversing hoist, the combination of a wheeled frame having a load-lifting mechanism provided with a reversible friction drive thereon; an upper limit stop having connections to said friction drive whereby the lifting action shall be stopped when said lifting mechanism has reached its uppermost limit *without a load*." (Tr. 987)

The Examiner in Patent Office Action of January 9, 1931, said:

"Claims 8-11 are rejected as involving no invention over Gerlinger's 1,422,958." (Tr. 990)

(This Gerlinger patent on which said proposed claim 8 was rejected was granted on an application co-pending with the patent in suit. It described positive and uniformly-acting load-lifting and lowering mechanism, but did not include a brake, the necessity for which was later perceived; this brake is included in the combination stated by Claim 4 of patent in suit).

In acquiescence with the Examiner's ruling, said proposed Claim 8 was cancelled (Tr. 998).

A copy of Sheet 2 bearing Figure 5 of Grab's patent drawing is here given.





Dec. 29, 1931.

G. A. GRAB

1,838,939

LIFTING MECHANISM FOR TRAVERSING HOISTS

Original Filed July 23, 1927

3 Sheets-Sheet 2

FIG. 6

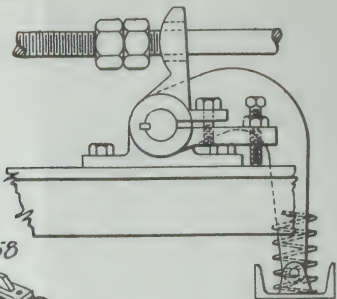
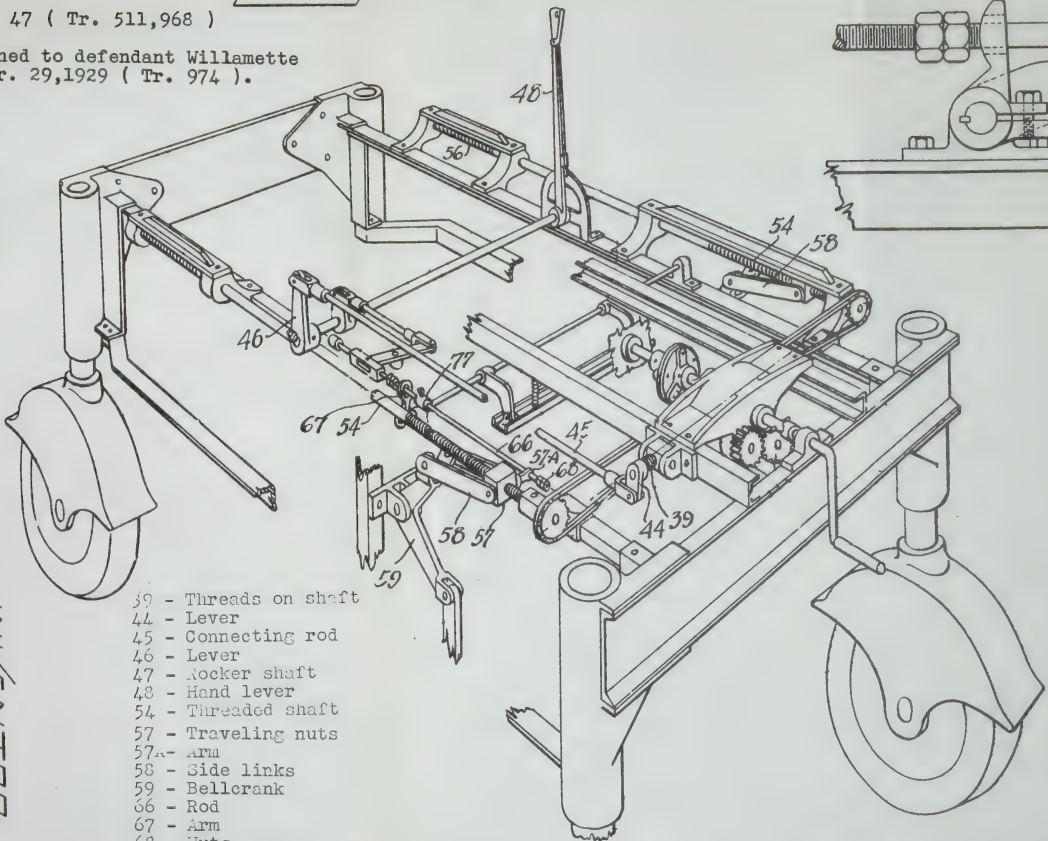


FIG. 5



- 39 - Threads on shaft
- 44 - Lever
- 45 - Connecting rod
- 46 - Lever
- 47 - Rocker shaft
- 48 - Hand lever
- 54 - Threaded shaft
- 57 - Traveling nuts
- 57<sup>a</sup> - Arm
- 58 - Side links
- 59 - Bellcrank
- 66 - Rod
- 67 - Arm
- 68 - Nuts
- 77 - Stop

Pl'ff's Exh. 47 ( Tr. 511,968 )

Patent assigned to defendant Willamette  
Hyster Co. ,Mar. 29,1929 ( Tr. 974 ).

INVENTOR  
G. A. Grab  
ATTORNEY



The load-lifting and lowering mechanism shown by Fig. 5 of the Grab patent drawing corresponds with that provided in the straddle-type carrier sold by defendants Willamette-Hyster Company to defendant Clark-Wilson Company about March 18, 1935 (Tr. 572) shown by Exhibits 56-A and 56-B (Tr. 573) above referred to. A copy of Exh. 56-B (Tr. 1011) is here given.

(Please see next page.)

The load-lifting and lowering devices shown do not comprise rack-and-pinions, as in plaintiff's patent, but instead consist of horizontally-arranged screws driven in opposite directions by the motor and cooperating devices, which performed the same functions as the rack-bars of plaintiff's patent.

The construction shown by Exhibit 56-B is the same as that contained in the carrier sold by Willamette-Hyster Company to Chambers Lumber Company at Cottage Grove, Oregon, which, John L. Waters, General Superintendent of plaintiff saw, and took a photo of, which photo is Plaintiff's *Exhibit 35* (Tr. 417, a copy of this photo will be found at page 941 of the Trans.) and a reproduction is here given.

(Please see next page.)



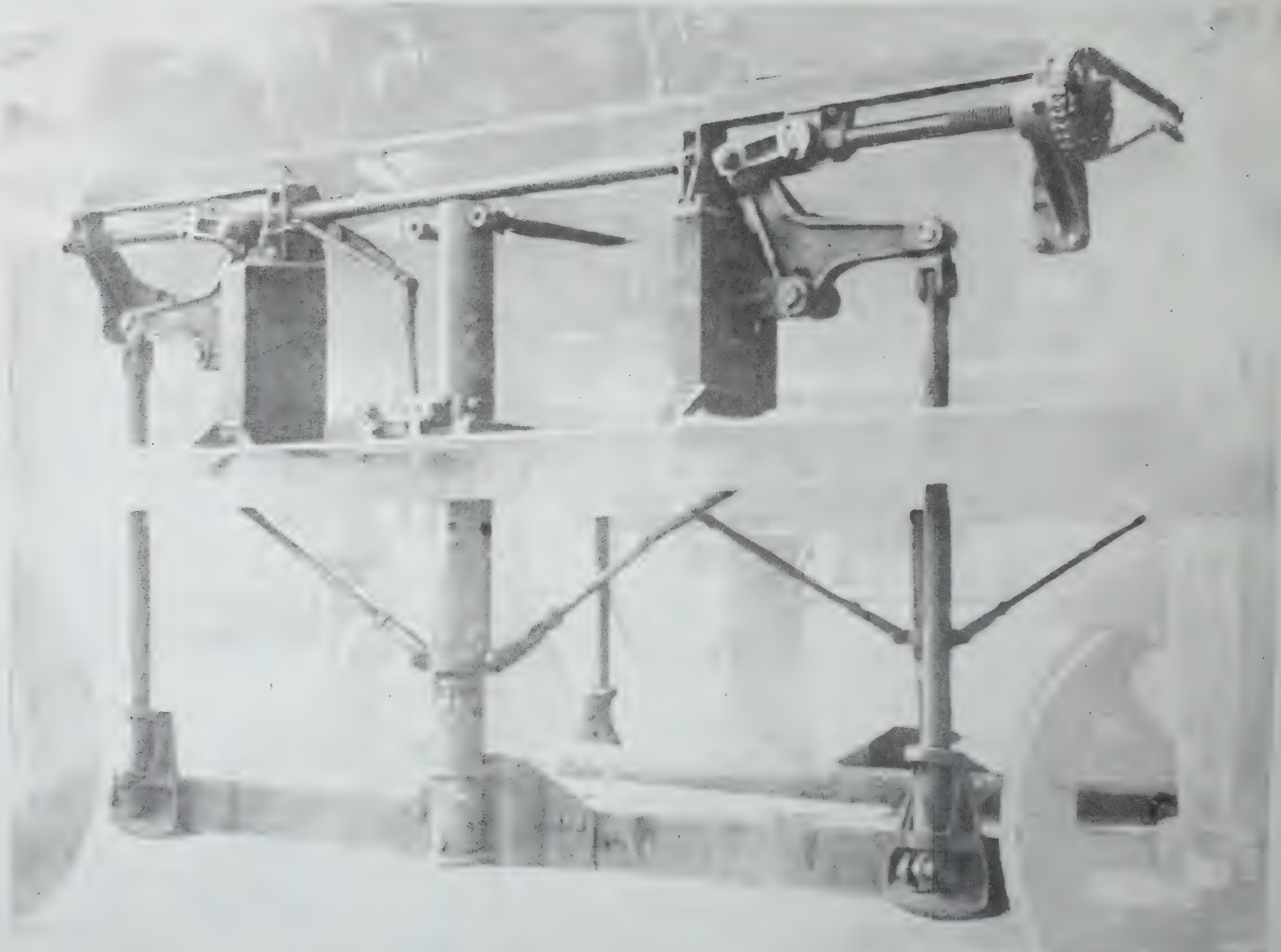


Copy of photo of Clark & Wilson Lumber  
Company's Willamette-Hyster carrier No.1  
sold to defendant, Clark & Wilson Lbr. Co.  
March 18, 1935 Def'nts. Exh.56-B (Tr.573-1012)





Photo of carrier sold by def't. Will-  
amette -Hyster Co. to Chambers Lbr. Co.  
at Cottage Grove, Oregon. Pl'ff's. Exh.  
35 ( Tr. 417 and 941 ).



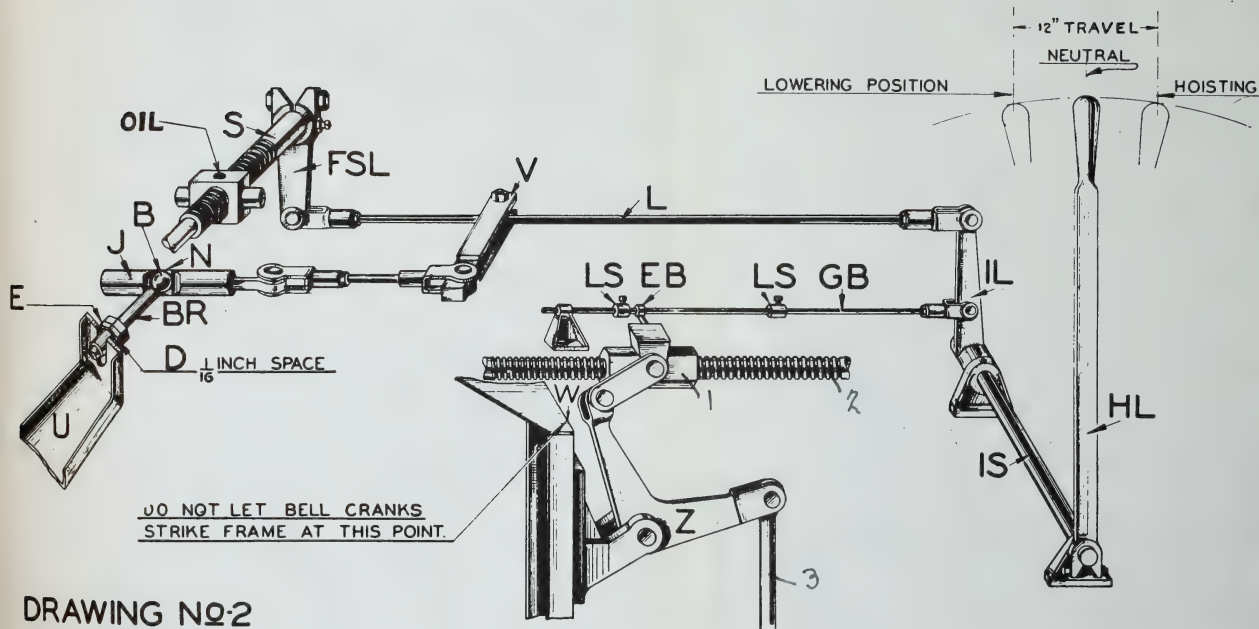




The construction of the load-lifting and lowering mechanism and control contained in these carriers is illustrated in a booklet entitled "*Service Manual*" put out by defendant Willamette-Hyster Company, constituting plaintiff's Exh. 32 (Tr. 409). This Service Manual contains an illustration designated "*Drawing No. 2*", Plaintiff's Exhibit 34, (Tr. 410), a copy of which will be found in the Trans. at page 940-A and a reproduction is here given.



"Drawing No.2" plaintiff's Exh. 34 page 5 of the "Service Manual" put out by defendant, Willamette-Hyster Company. plaintiff's Exh. 32 ( Tr. 409, Copy Tr. 940-A )



"Stops LS are mounted on guide bar GB which is connected to hoist hand lever HL through intermediate lever IL and shaft IS. These stops draw the hoist clutch into neutral position when struck by eyebolt EB while raising or lowering load shoes.

The eyebolt EB is on the nut 1, on the screw 2, connected by linkage to bell lever Z, connected by rods 3 with the lifting shoes. When the lifting mechanism has reached its limit of travel in either direction the stops LS on rod GB cause the return of lever HL to its neutral position thus disengaging the clutch and applying the brake. Waters, Tr. 414-415





Drawing No. 1 of the Service Manual shows the clutch mechanism, which, however, need not be studied. It is sufficient to follow the movements of the devices by which the clutch is automatically engaged with the motor to raise or lower the shoes, and the brake is simultaneously released; and, reversely, the clutch is disconnected from the motor, and the brake is applied to hold the shoes when moved to the permitted limits.

This action is readily understood from the testimony given by plaintiff's witness John L. Waters, (Tr. 414) and the explanation given in the "Service Manual" under "Drawing No. 2", which reads as follows:

"Stops LS are mounted on guide bar GB, which is connected to hoist hand lever HL, through intermediate lever IL, and shaft IS. These stops draw the hoist clutch into neutral position when struck by eyebolt EB, while raising or lowering load shoes."

The eyebolt EB is on the nut 1, on the screw 2, connected by linkage to bell-levers Z, connected by rods 3 with the lifting shoes. When the lifting mechanism has reached its limit of travel in either direction the stops LS on rod GB cause the return of lever HL to its neutral position, thus disengaging the clutch and applying the brake. (Waters, Tr. 414-15).

The defendants, in order to plead the defenses of laches and *estoppel*, alleged in the answer, paragraph XX (Tr. 26).

“\* \* \* that Lumber Carriers substantially identical in construction and operation with the Lumber Carriers complained of herein, have been made and sold and widely used throughout the United States of America for more than six years prior to the bringing of this suit, \* \* \*.”

The plaintiff desiring further specific information as to the construction of these carriers required the defendant Willamette-Hyster Company to answer an Interrogatory, viz:

## INTERROGATORY

No. 4 (Tr. 42)

State whether the lumber carrier which defendant Willamette - Hyster Company is at present manufacturing and/or selling embodies the following elements in combination, viz:

A lumber carrier comprising a frame,

load lifting means mounted therein,

means for transmitting motion from a source of power to the load-lifting means comprising a clutch that can be set in neutral position or to cause the load-lifting means to move in either direction,

ANSWER TO  
INTERROGATORY

(Tr. 49)

The industrial truck or carrier that defendant Willamette-Hyster Company is at present manufacturing and selling comprises, viz:

A lumber carrier comprising a frame,

screw lifts supported by such frame for raising and lowering any desired load,

a motor to supply power for operating the screw lifts, a power controlling device to transmit and control power from the motor to such screw lifts,



means for manually moving the clutch to operative position,

automatic means for moving the clutch to neutral position upon a movement of the load-lifting means to a predetermined extent in either direction,

and means for braking the transmitting means whenever the clutch is moved to neutral position.

a handle for manually operating such power controlling device to drive the screw lifts in either of two directions or to bring the power controlling device to neutral position so that no power from the motor is transmitted to the screw lifts,

limit stops cooperating with screw lifts and operable automatically and independently of any load carried by the truck to bring the power controlling device to neutral whenever the screw lifts reach predetermined upper and lower limits,

an automatic spring operated brake to hold the screw lifts and connected mechanism against movement whenever the power controlling device is placed in neutral.

The devices listed under the heading "Interrogatory No. 4 are, as will be noted, the elements composing Claim 4.

The making of the limit stop mechanism of defendants' carrier so as to operate "*independently of any load carried*" was merely copying the mechanism used in plaintiff's carriers after the building of the plaintiff's first carrier (Tr. 62). Grab knew this; nevertheless, tried to get a patent claim on a combination involving the same feature; which, however, the Patent Office rejected, as above mentioned, on the Gerlinger patent No. 1,422,958.

Note, the *identity in purpose, function, and result between the screw-operated load-lifting and lowering devices of defendant's, Willamette-Hyster Company's, straddle-type carrier and the rack-bar and pinion mechanism shown by plaintiff's patent.*

The Master referring in his Report (Tr. 69)—to Mr. Gerlinger's perception, that "*the inherent defects*" of a cable-operated mechanism could be remedied by a mechanism of a "*positive or rigid type*" defined this *positive* mechanism as including *rack bars and pinions, toggle lifts or screw type.*" Defendant Willamette-Hyster Company used the "screw type."

In placing the upward-movement stops on the rack-bar (see Exhibit 6, a reproduction of which is given at page 9 of this brief) "*the action of Nos. 90, 91, and 66 performed the same function with regard to the upward movement \* \* \* that No. 65 and 66 performed in the downward movement*" the Master said (Tr. 63). The downward movement stop-parts 65 and 66 are those shown in Figure 3 of the patent drawing.

The Master finding no patentable novelty in Mr. Gerlinger's positive and uniform acting mechanism decided that Claim 4 might be saved by judicial construction of the element—*automatic means for moving the clutch* to neutral position upon the movement of load-lifting means to a predetermined extent in *either* direction, if these "means" be defined specifically as designating *load-operated*, up-movement stop bar 67 described as in the specification of the patent.

The Master said:

*"The plaintiff does not limit the stops of his patent to a specific means whereby the clutch is thrown into neutral and the brake simultaneously applied \* \* \*. The plaintiff insists that his patent covers ANY means which will bring the desired results."* (Tr. 75, 76)

(Tr. 75, 76)

The Master further said (Tr. 77) that the plaintiff's patent "cannot be accorded a broad construction but must be limited to the particular means he describes \* \* \* *If thus limited* it must be defined as an *automatic stop actuated by the load itself in upward movement*, and an automatic stop controlling the down movement of the kind and character shown by his drawing and specification. Under this limitation and construction of the patent, the defendant's device does not infringe. "Defendant achieves cessation of upward movement irrespective of the presence of the load and the means to control the downward movement is substantially different from that described by Gerlinger's plans and specifications. *Even if it can be said that defendants' means of downward movement control is a mechanical*

*equivalent of Gerlinger's means for such control, infringement does not exist, because defendants' device omits an essential element of Gerlinger's combination, namely the load-actuated stop governing the upward movement."* (Tr. 77, 78)

The plaintiff duly excepted to the Master's above findings of non-infringement (Tr. 88).

The District Court in its opinion remarked (Tr. 132) :—

"that Gerlinger showed nothing in the patent which would entitle him to a monopoly except a combination including the load stop. \* \* \*

*"Under the specifications, Gerlinger could, as he actually did in practice, have substituted the type of stop on the downward movement for the load actuated stop of the upper movement."* \* \* \* (Tr. 134)

"While \* \* \* Gerlinger had the right to use the stop shown for the downward movement upon the upward movement also, he therefore lost the peculiar combination upon which the patent was based." (Tr. 141)

And so the District Court found:

"22. That the lumber carriers manufactured and sold by defendant Willamette-Hyster Company did not constitute an infringement of Claim 4 of the patent in suit;"

"And made the same finding with regard to the lumber carriers in use by defendant Clark & Wilson Lumber Company." (Tr. 153)



## III.

## THE ALLEGED LACHES AND ESTOPPEL

Paragraph XX of the Answer (Tr. 26) alleges:

“For a further and separate defense defendants allege that Lumber Carriers substantially identical in construction and operation with the Lumber Carriers complained of herein, have been made and sold and widely used throughout the United States of America for more than six years prior to the bringing of this suit, and at all of such times plaintiff and its predecessors in interest have had full knowledge of the construction and operation of such Lumber Carriers and of said widespread manufacture, use and sale thereof, but neither plaintiff nor its predecessors in interest have at any time prior to the bringing of this suit asserted or attempted to enforce any alleged rights under the patent in suit with respect to any of such long-continued manufacture, use or sale of said Lumber Carriers; and throughout all of such time plaintiff and its predecessors in interest have continually recognized and acquiesced in the right of defendants and of the public to make, use and sell such Lumber Carriers and have thereby encouraged the manufacture, use and sale of such Lumber Carriers, and the investment by defendants and others of large sums of money in making, using and selling such Lumber Carriers; and in reliance upon such conduct of plaintiff and its predecessors in interest defendants did so invest large sums of money for which reason plaintiff is guilty of laches with respect to the alleged cause of action attempted to be stated in the bill of complaint

herein and is estopped to assert any of its alleged rights under the patent in suit against defendants, or either of them.

The plaintiff asked for further Particulars (Tr. 31), and the defendants responded as follows:

Particulars wanted (Tr. 31):—

“9. With further regard to paragraph XX of defendants’ Answer and particularly in reference to the allegation therein that during the said alleged prior making and selling of said lumber carriers the “plaintiff and its predecessors in interest have continually recognized and acquiesced in the right of the defendants and of the public to make use and sell such lumber carriers”;—

“State specifically what the alleged recognition and/or acquiescence on the part of plaintiff and its predecessor in interest consisted of, that is,”—

“(a) Whether such alleged recognition and acquiescence will be predicated upon the failure of plaintiff, and/or its predecessors in interest, to take any action against said makers and users.”

Defendants answered:—

“Yes”. (Tr. 36).

Further particular demanded:—

“9 (b) ; (First paragraph) (Tr. 32)

Whether some act, and/or conduct of the plaintiff, and/or its predecessors, was relied on by defendants, or either thereof, and in such event state the particulars fully of such act and/or conduct.”

Defendants answered:—(Tr. 36)

“The failure of plaintiff and its predecessors with full knowledge of the facts to assert any rights under the patent in suit against defendants’ carrier or others substantially identical therewith for more than six (6) years prior to suit.”

Further particular demanded:—

“9 (b) ; (Second paragraph)

Referring further to paragraph XX \* \* \* alleging that ‘in reliance upon such conduct of plaintiff and its predecessors in interest, defendants did so invest large sums of money’, state for what purpose, and when, and where the defendants, respectively, invested large sums of money in reliance upon any act or conduct by the plaintiff, or its predecessors in interest, in the premises.”

Defendants answered:—(Tr. 36)

“Defendant, Willamette-Hyster Company, and its predecessors in interest in Portland, Oregon, ever since 1924\*, has expended large sums of money for *plant equipment, materials, labor and development work* in the manufacture and sale of the carriers alleged to infringe the patent in suit.”

“The defendant, Clark & Wilson Lumber Company in Portland, Oregon, ever since 1923, has expended large sums of money for the purchase of carriers substantially identical with the carriers complained of herein as infringements of the patent in suit.”

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(Note: \*‘1924’ is incorrect. Defendants’ *Willamette-Hyster Company’s predecessors Willamette-Iron & Steel Company* did not begin the making of straddle-type carriers until September 1926. (Tr. 595), and first delivery was early in 1927 (Tr. 609).

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The plaintiff desiring further ellucidation was permitted to file Interrogatories.

*Interrogatory No. 5 (Tr. 43)*

“(a) State whether the defendant Willamette-Hyster Company or anyone in its behalf, had any correspondence or conversation, with the plaintiff, or any person connected with the plaintiff, since 1924, about a lumber carrier embodying the combination described by Claim 4 of the patent in suit.”

Defendants answered:—

“No.” (Tr. 49)

*Gustav A. Grab*, defendants’ all inclusive witness testified:—

He was in the employ of plaintiff when Mr. Gerlinger invented his improved rack-end-pinion straddle-type carrier described by the patent in suit. (Tr. 577).

The first carrier had only a load control up-stop. Nine further carriers were then built which had lift control stops in addition to a load-control stop. (Tr. 581)

January 1, 1926, Grab was discharged by plaintiff, (Tr. 754). A few days later, Jan. 15, 1926, Grab entered the employ of Willamette-Iron & Steel Company (Tr. 594).



September 1926 Grab began designing a positive lift straddle-type carrier for Willamette Iron & Steel Company (Tr. 595).

The first delivery of these carriers was made early in 1927. (Tr. 609).

Grab stated he called "on lumber operations (operators) and principally in the West Coast territory. \* \* \* As a whole the market was rather limited for lumber carriers."

"Q. Would you say then that the list of prospective customers for carriers was a broad one or a narrow one?

"A. *It was definitely a narrow market.*" (Tr. 584-5)

Grab testified that Willamette Iron & Steel Company continued to sell its straddle-type carriers (Tr. 609); *but he was not asked, nor stated how many of these carriers were sold by Willamette Iron & Steel Company, nor when sold.*

*About February 15, 1929, the Willamette Iron & Steel Company sold its carrier business to the Willamette-Ersted Company, the former corporate name of defendant Willamette-Hyster Company, and Grab entered the employ of the latter company (Tr. 595).*

*It is to be noted that neither the Willamette Iron & Steel Company, nor defendant Willamette-Hyster Company claimed any patent rights of their own.*

Full knowledge by defendant Hyster Co. of the scope of plaintiff's patent is shown by the following circumstances:

Grab made an application for patent on straddle-type carriers with positive load-lifting and lowering mechanism and control embodying the design he got up for Willamette Iron & Steel Company. Grab's application was originally filed July 23, 1927 and then substituted by an application filed May 26, 1930. See caption of this Grab patent, Plaintiff's Exh. 47, (Tr. 965). In this application Grab attempted to get a claim as follows: (Tr. 987)

"8. In a traversing hoist, the combination of a wheeled frame having a load lifting mechanism provided with a reversible friction drive thereon; an upper limit stop having connections to said friction drive *whereby the lifting action shall be stopped when said lifting mechanism has reached its uppermost limit without a load.*"

The Examiner of the Patent Office rejected this claim "as involving no invention" over Gerlingers 1,422,958", (see File Wrapper Tr. 996). The patent so referred was Mr. Gerlinger's first patent on positive load-lifting and lowering mechanism, which patent did not include a brake in the control mechanism for holding the load against settling. Grab in response to said rejection cancelled claim 8 (Ib. 997), and thereupon Grab's patent was allowed on details of construction not pertinent to the instant case. This patent was assigned to the defendant Willamette-Hyster Company, (see Exhibit 49 and 50; Tr. 520 and 974).

*The first carrier bought by Clark & Wilson Lumber Company from defendant Willamette-Hyster Company was delivered March 18, 1935, (Tr. 572), a few months before this suit was instituted, which was Oct. 3, 1935.*

1936

In all, up to the date of trial—November 23, ~~1920~~, (Tr. 178)—defendant Willamette-Hyster Company and its predecessor sold over 300 carriers.

The dates when defendant Willamette-Hyster Company and its predecessor sold these 300 carriers, the cost, or the selling prices of these three hundred carriers, defendants did not state.

Only at the last minute, before the trial closed Grab merely was asked:

“During the time that you have been with the defendant Willamette-Hyster Company or its predecessors in business, how much in round numbers is the *total gross sales of carriers having the construction* generally of the defendant Clark & Wilson Lumber Company’s Willamette Carrier (referring to defendant’s Exh. 56-A, and 56-B).

Answer: Well over \$2,000,000.00 (Tr. 765).”

The Master, apparently adopting the allegations of Defendants’ Answer in his report, (Tr. 85) stated that plaintiff “permitted the Willamette-Hyster Company to invest large sums of money in plans, equipment and in manufacture of its carrier.”

But note, *only the total amount of such sales* of these carriers is given. Neither the cost of carriers, nor cost of the equipment used, nor whether any special equipment was required was stated.

Dividing the \$2,000,000.00 received by the 300 carriers sold we have an average of \$6,666.66 per car which is much in excess of the price received by plaintiff for its carriers—\$3,850.00 for light models and up to \$7,050 for large six-wheel model carriers, which Willam-



ette-Hyster Company did not make; and is likewise much above the price of the Ross carriers, \$4,500 for smaller machines to \$5,000.00 for the larger ones (Tr. 572).

This suit was filed October 3, 1935, and the patent, dated May 29, 1923, then had four years and about eight months to run.

Mr. Gerlinger testified that he did not know of defendant Willamette-Hyster Company's infringement until September 1935. The circumstances were as follows: (Tr. 198)

"Q. When did you first find that the defendants were manufacturing a carrier which embodied the claim for patent in suit?

A. September, 1935.

Q. What were the circumstances under which you made that discovery?

A. I sold two machines to Shevlin-Hixon at Bend, Oregon, and after we received the requisition a few days later, we received a letter to ask us for a guarantee for infringement of patents." (See Letter dated Sep. 11, 1935) Pl'ff's. Exh. 8; (Tr. 203, and 917).

Plaintiff had sold Shevlin-Hixon carriers for many years but never had been asked for a guarantee before. (Tr. 200). Rumors came from Shevlin-Hixon that the Willamette-Hyster Company threatened to sue plaintiff for infringement (Tr. 201). Plaintiff sent its general superintendent Waters to investigate. After obtaining copies of patents issued to Grab, Plaintiff con-



sulted counsel who advised that the carriers that the Willamette-Hyster Company were building apparently infringed Plaintiff's patent (Tr. 202-3). This suit was then filed.

Plaintiff built ten carriers under its patent up to 1923, then discontinued making rack-and-pinion carriers and from 1923 to 1929 made and sold hydraulic lift carriers only. Mr. Gerlinger had a patent on these carriers also and believed them to be superior; but after prolonged trial they were not found satisfactory; (Tr. 234, and 389).

By the end of 1928 the plaintiff resumed making and selling rack-and-pinion carriers exclusively (Tr. 228). The first delivery of these rack-and-pinion carriers, called RPF, was March 5, 1929 (Ballantyne, Tr. 481). (See further sheets and records of sales of Plaintiff's RPF carriers, def'ts. Exh. 45, (Tr. 953) and Pl'ffs. Exh. 46, (Tr. 961).

In this connection a grievous misreading of the evidence by the District Court must be noted.

The Court said in its opinion (Tr. 142):—

“In 1935 \* \* \* plaintiff went back to the manufacture of the rack-and-pinion carriers”.

This statement suggests that plaintiff discontinued the manufacture of its rack-and-pinion carriers, and returned to the same only after it learned of the infringement by defendants. This is wrong as stated, plaintiff resumed making rack-and-pinion carriers *exclusively* at the end of 1928.

After this suit was brought defendant Willamette-Hyster Company defiantly continued to make and sell its infringing carriers.

Defendant Clark & Wilson Lumber Company bought a number of infringing carriers from defendant Willamette-Hyster Company, the first of which was delivered March 18, 1935, a few months before this suit was brought. When the remaining carriers were delivered neither of the defendants told.

Plaintiff tried to prosecute this suit vigorously, but was hindered by circumstances beyond its control. On November 12, 1936, over a year after suit was instituted, the District Court entered an Order referring the trial to the Standing Master, because of the congested state of the Court calendar, caused by vacancy in the Office of the United States District Court judge, and the large number of criminal cases to be disposed of (Tr. 52). The case went on trial November 23, 1936 (Tr. 178). The Master did not file his report until July 1, 1937 (Tr. 87). Exceptions to the Master's Report were promptly filed, but the Court did not pass on them until Feb. 6, 1939 (Tr. 143); and the final decree was not entered until June 30, 1939 (Tr. 159).

Further discussion of the question of Laches and Estoppel will be continued under ARGUMENT, Section III.

## ARGUMENT

## I.

CLAIM 4 OF PLAINTIFF'S PATENT  
IS VALID

It will suffice to state here Appellant's Points on Appeal 9 and 10 (Tr. 794, 795, 796) :

"9. The District Court erred in finding as a conclusion of law that the association of elements composing the combination defined by claim 4 of the patent in suit was a mere aggregation, and does not constitute a patentable combination.

"10. The District Court erred in failing to find as a conclusion of law, that anticipation of the combination described in Claim 4 of the patent in suit was not made out, and that said claim is valid."

The introduction of the specification of the patent definitely states the purpose of the invention, viz:

"An object of the invention is to provide an improved form of lifting device that *will have four lifting points that lift positively and in unison.*"

"Another object is to provide a form of automatic stop for the lifting device that will operate when the limited motion in either direction is reached, and also apply a brake mechanism."

*Claim 4 of the patent in suit states a new and useful patentable invention.* It is composed of six elements designated in the District Court's Opinion (Tr. 126) as follows:

"A Lumber Carrier comprising

"1. A frame;

"2. Load-lifting means mounted THEREIN;

"3. Means for transmitting motion from a source of power to the load-lifting means, comprising a clutch that can be set in neutral position or to cause the load-lifting means to move in either direction;

"4. Means for manually moving the clutch to operative position;

"5. Automatic means for moving the clutch to neutral position upon the movement of the load-lifting means to a predetermined extent in EITHER direction;

"6. Means for breaking the transmitting means whenever the clutch is moved to a neutral position."

The District Court's 3rd. Finding (Tr. 145) describes the machine covered by the patent in suit as

"A self-propelled straddle-type truck having a load-lifting device mounted within the frame and between the wheels, the lifting mechanism comprising rackbars and pinions *CREATING four lift points that lift positively and in unison \* \* \*.*"

No similar combination is shown by the prior patents introduced by defendants.

The patents introduced in evidence by defendants as prior art and relied on may be arranged in two groups.

*Group 1* comprises straddle-type carriers, viz:

Ross No. 1,209,209, dated December 19, 1916

Ross No. 1,271,947, dated July 9, 1928

Overlin No. 1,289,529, dated December 31, 1918

Overlin No. 1,323,719, dated December 2, 1919

*Group 2* comprises the prior patents introduced by defendants to show platform hoists, stationary or wheel-mounted, provided with control mechanism by which the raising and lowering of the platform is limited to predetermined levels, and some of these patents also include a brake, viz:

Dingee .....No. 414,380 (Tr. 1104)

Nicholson .....No. 1,340,458 (Tr. 1114)

French & Pavey ...No. 1,360,917 (Tr. 1122)

Towson & Cochran.No. 1,337,804 (Tr. 1130)

Cochran .....No. 1,260,145 (Tr. 1140)

Carr .....No. 1,407,124 (Tr. 1152)

Boudinot .....No. 537,628 (Tr. 1212)



A particular difference is to be noted in operation between a straddle-type carrier and a platform hoist; the straddle-type carrier has lifting and lowering mechanism comprising *four, independent, lifting points*, while the mechanism of platforms has only a *single lifting point*.

All of the patents in Group 1 were cited by the Examiner of the Patent Office in the application for the patent in suit, No. 1,457,025, or in the application for Gerlinger's earlier patent, No. 1,422,958, Pl'ff's. Exh. 4 (Tr. 858). These two applications were co-pending. The earlier Gerlinger patent covered a similar combination as the patent in suit, but did not include a brake in the control for the load-lift; such brake being a later development.

The defendants introduced all of the fifteen patents cited by the Examiner in the application for patent in suit in a group as Defts' Exhibit 57.

*It is to be noted* that the patents listed in Group 2 include the Carr patent, No. 1,407,124, Elevator Truck.

Grab, Defendants' expert witness, testified that *all the hoists truck patents introduced by defendants "are substantially alike in principle of operation."* (Tr. 716) *The Carr patent, No. 1,407,124, was specifically cited and considered by the Examiner of the Patent Office in allowing the patent in suit.*

It is to be noted that while the said 3rd. Finding of the District Court describes the lifting mechanism as "*comprising rack-bars and pinions creating four lifting points that lift positively and in unison*, the Master defined this mechanism more broadly as comprising *mechanism "of a positive or rigid type such as rack-bars and pinions, toggle lifts or screw type."* The devices em-

ployed by the defendants in their infringing straddle-type carriers did not comprise rack-bars and pinions, instead consisted of toggle lifts and screw type. But such mechanism *does provide a four-point lift of the shoes actuated positively and in unison*, the particular features described by the patent in suit.

Each of the straddle-type carriers listed under Group 1 *has a cable-operated lifting and lowering mechanism*, comprising load-carrying shoes slidably mounted on the inner sides of the four tall legs of the carrier; and these shoes are raised and lowered by the winding up and unwinding of the cables, from which they are suspended, by the driver.

There was no pretense that these patents suggest their reconstruction so as to make the raising and lowering of their four load-carrying shoes positive and in unison. The reason why defendants specifically introduced the Ross patent No. 1,209,209 as their Exh. 78 was to emphasize the fact—self evident—that the lifting mechanism of a straddle-type carrier had nothing to do with propulsion of this carrier. (Grab. Tr. 760.)

The lift mechanism of these straddle-type carriers, is illustrated by the Ross patent, No. 1,209,209, a copy of which is given at page 3. of this brief. Cable-lift mechanism was undependable. One of its particular faults was, since the shoes had to be lowered by gravity, when empty they were apt to stick in there sideways, and would not descend.

The Master, in his Report (which the District Court accepted and affirmed, (Tr. 144) said (Tr. 76):

“Load lifting means mounted *therein*, having *four* lifting points that lift positively and in unison. (*Gerlinger*) *may well have been the first to conceive.*”

None of the prior cable-lift straddle-type carriers had such means, nor had they any automatic means for limiting the lifting or lowering of the load to predetermined levels. The lifting and lowering of the load in cable-lift carriers was controlled *manually* by the driver of the carrier.

None of the wheel-mounted platform hoist patents suggested the building of a straddle-type carrier. So testified plaintiff's expert witness Dickson (Tr. 765); and defendants' witness Grab, on cross-examination, confirmed such statement. (Tr. 716, 717).

Thus, the straddle-type carriers described by the patent in suit had *two novel features*:

First: The elimination of the undependable cable-lift and providing in place thereof mechanism lifting and lowering the four, independent load-carrying shoes *positively and in unison*.

Second: *The providing of “automatic means”* for moving the clutch into neutral position upon the movement of the load lifting means to a predetermined extent in *either direction*. The latter element included a brake to prevent the settling of the load during the travel of the carrier.

Nevertheless, the Master, in his Report (Tr. 76), and the District Court in its opinion (Tr. 138) held it to be “*inconceivable*” that a combination based on these new features in a straddle-type carrier constituted invention. In short, the District Court's Opinion was that with the cable-operated lift of the Ross straddle carrier, or the



Overlin straddle carrier before a skilled mechanic, plus lift-control mechanism such as suggested by the Dingee patent, No. 414,380 describing an Elevator, or the Carr patent, No. 1,407,124, describing an Elevator Truck, no problem existed in providing four load-carrying shoes *actuated positively and uniformly*, and a suitable lift control for limiting the lifting and the lowering of the shoes to predetermined levels.

When Gerlinger perceived the necessity of eliminating the cable-operated lift mechanism of the Ross or Overlin straddle carriers, and the replacing of this mechanism by devices actuated *positively and in unison*, up or down, his perception of control mechanism *which limited the movement of the shoes in either direction* naturally followed, as necessary for preventing the injury of the lifting mechanism. Conceding that the prior platform hoist truck patents do show similar control mechanism as employed by Gerlinger, it is elementary that the novelty *per se* of the elements of a combination is immaterial so long as they cooperate to produce a new and useful result.

The patentable novelty of the invention covered by Claim 4 was given very careful consideration by the Patent Office.

It appears from defendants' Exh. 57 (Tr. 574) (see Index of Volume I Viic) that the Examiner cited and considered 15 patents in passing on the application for the patent in suit. (The File Wrapper of patent in suit, Pl'ff's. Exh. 5, will be found in the Trans. at p. 889). And in passing on the Gerlinger earlier patent, No. 1,422,958, the Examiner considered 10 patents, (see Tr. 1203), *including the Ross patent, No. 1,209,209*, on which the defendants evidently particularly relied since,



although this patent was already in the record as the Pl'ff's. Exh. 1-A, the defendants again made it specifically their own Exh. 78. (The File Wrapper of Gerlinger patent No. 1,422,958 will be found in the Trans. at P. 858).

If the solution of the problem was so obvious to any skilled mechanic, as the District Court believed, *why did not Ross, or Overlin make the desired changes of their respective, cable-lift carriers?*

The history of the case shows that Ross and Overlin had the undependable working of their cable lifts for years before them prior to Gerlinger's improvement. Furthermore, Ross, and likewise Overlin, evidently had the improvement of their straddle carriers respectively in mind; Ross took out a second patent, No. 1,271,947 July 9, 1918, application filed Dec. 4, 1916; and Overlin, likewise took out a second patent No. 1,349,292, August 10, 1920, application filed Nov. 24, 1919. But neither suggested the *reconstruction* of their undependable cable-lift mechanisms.

Why did Ross delay seven years in *reconstructing* the cable lift of his carrier? He filed his first application for patent May 11, 1914, and after Gerlinger's improvement was brought out, which was in 1921, Ross immediately adopted it.

Overlin filed the application for his first patent, December 22, 1917, four years before Mr. Gerlinger's improvement was brought out.

Grab was in the employ of plaintiff when Gerlinger invented his improvement and put it into practice (Tr. 576). After Grab was discharged by plaintiff and had entered the employ of the Willamette Iron & Steel Company, Jan. 15, 1926 (Tr. 594), he himself filed an ap-

plication for patent (which matured in his patent No. 1,838,939, Pl'ff's. Exh. 47), the application for which was filed July 23, 1927, (Tr. 966) in which Grab stated, under oath, that the providing of a control limiting the up-movement of the shoes when *not* carrying a load was his invention. (See the rejected claim No. 8 in the File Wrapper of this patent, Pl'ff's. Exh. 51, Tr. 987). On the witness stand Grab testified that such control was *developed and used* in the Gerlinger straddle-type carrier after the building of first carrier by plaintiff. The fact to be noted in this connection is that Grab contended before the Patent Office that a claim in substance like Claim 4 of the patent in suit *is patentable*.

\* \* \* \*

Granting that the Court had of course the right to brush aside the testimony of the witnesses, and hold to its own deductions, the difference between the opinion of the witnesses and the Patent Office on the one hand and the opinion of the Court on the other hand, *proves that the question of invention may be debatable; and any fact debatable is still in doubt*.

#### ANALYSIS OF CLAIM 4

The District Court commented in its opinion (see Tr. 137) :

“There were various forms of carriers of different designs used for carrying lumber before the Gerlinger patents. The ‘straddle’ type carries the load ‘within’ the frame. Other types carry the load ‘upon’ or ‘in front of’ the frame. It is unquestioned that the previous art had shown examples of an elevator which had a positive means of lifting coupled with a means of limiting the movement in either direction of the load-lifting devices, in

carriers which transported the load either 'upon' or 'in front of' the frame.

This is straining the facts in the case. Claim 4 is not readable on the prior cable-lift straddle-type carriers, nor on the prior platform hoist trucks.

Claim 4 designates A "Lumber Carrier" embodying a combination composed of the following elements:

"1 A frame;

2. Load-lifting means mounted *therein*;

3. Means for transmitting motion from a source of power to the load-lifting means, comprising a clutch that can be set in neutral position or to *cause the load-lifting means to move in either direction*;

4. Means for manually moving the clutch to operative position;

5. Automatic means for moving the clutch to neutral position upon the movement of the load-lifting means to a predetermined extent in *either direction*;

6. Means for braking the transmitting means whenever the clutch is moved to a neutral position."

Let us analyze Claim 4 just as we would construe any written instrument in order to ascertain its true meaning and intent.

Element 2 describes load-lifting means mounted *therein*. This description together with the introductory phrase "*Lumber Carrier*" specifically designates load-lifting means provided between the wheels of the carrier and adapted to carry a stack of lumber, as is illustrated by the patent drawings of the *Ross Carrier*, No. 1,209,209, a copy of which is given in the beginning of this Brief. The introductory phrase "*Lumber Carrier*" further designates that the load-lifting means comprise the usual load-carrying shoes slidable, up or down, in vertical



guideways on the inner sides of the four tall legs. The load-lifting means must further include some devices by which the shoes are moved up or down, since the next element 3 merely describes *means for transmitting motion* from a source of power to the load-lifting means.

We must next determine *what are the particular load-lifting means*. The introduction of the specification of the patent tells us that the "object of the invention is to provide an improved form of lifting devices that will have four lifting points that lift positively and in unison".

We learn from the prior art that the preceding straddle-type carriers had *cable-lifting* and lowering mechanism which is not positive in its movement in both directions. Cables can exert a positive lifting force, but they *cannot exert a positive lowering force*. All that can be done to lower the shoes is to slacken the cables and thus let gravity move the shoes down; in other words, unwinding of the cables *merely permits* the shoes to descend in their slideways; but, as testified by Mr. Gerlinger and pointed out in the beginning of this Brief, sometimes due to splinters getting in the slideways of the shoes, and also in the winter season, the shoes are *apt to stick in their slideways and would not lower* with the unwinding of the cables; and then, as obvious, the picking up of the load could not be proceeded with, but required that the driver or someone *first loosen the shoes* in their slideways so that they could descend.

Referring further to the element 3 of the claim, we find that this describes *means for transmitting motion* from a source of power to the load-lifting means \* \* \* *to cause the load-lifting means to move in either direction*. Motion could not possibly be transmitted through



*flexible cables* to cause the shoes to move downward. Hence, *we must have rigid devices* such as rackbars carrying the shoes, and pinions meshing with the rackbars; or equivalent devices, such as nuts threaded on screws rotatable in opposite directions and toggle connections between the nuts and the vertically movable devices carrying the shoes. *Hence claim 4 is not readable on straddle-type carriers provided with cable-lift mechanism.* Nor is claim 4 readable *on platform hoist trucks*, since they are to be classified in a different art than straddle-type carriers, and do not suggest the building of a straddle-type carrier. (Grab. Tr. 717).

As said by this Court of Appeals in Los Alamitos, Sugar Co. v. Carroll, 173 Fed. 280, 284, 285, (283) :

“It is manifest, we think, that these claims are limited to the dumping of wagons \* \* \* A device which does not operate on the same principle cannot be an anticipation.” \* \* \*

(P. 285). “It is not sufficient to constitute anticipation that a device relied upon might, by a process of modification, reorganization, or combination with each other, be made to accomplish the function performed by the device sued on.”

The District Court appears also to have held the opinion that the rack and pinion mechanism should have been specifically set forth in claim 4 as an essential of the particular combination (Tr. 140) so as to distinguish ~~from~~ cable-lift carriers. But this would have imposed an undue limitation on the invention. The Patent Office, in recognition of this fact, allowed the claim with the elements broadly stated. It would be unfair to limit the inventor to the rack and pinion when other *mechanical equivalents* of the rack and pinion, such as a rotatable screw, would also accomplish the purpose of the inventor.

It was the duty of the court to read Claim 4 in the light of the specification. When so read there is no reasonable doubt as to what Claim 4 describes.

In *Turrill v. R. R. Company*, 1 Wall, 491, 510, the Court said:—

“Patents for inventions are not to be treated as mere monopolies, and therefore odious in the eyes of the law; but they are to receive a liberal construction, and under the fair application of the rule, *ut res magis valeat quam pereat*, are, if practicable, *to be so interpreted as to uphold and not to destroy the right of the inventor.*”

Applying such doctrine to the facts before the Court in that case, the Court continued:—

“\* \* \* \* *Evidently the claim must be construed in connection with the explanation contained in the specification*, and when viewed in that light it is quite clear that he should receive a more restricted construction than was given to it in the judgment of the Court. \* \* \* *Obviously it is not a claim for any kind of movable press-block, combined and operating in any way with any kind of fixed block to accomplish any purpose, or effect any kind of result.* Giving that construction to the claim then, indeed, it would be true that the plaintiffs, when they admitted that movable press-blocks in combination with various shapes and used for various purposes were older than the invention of the patentee, did admit away their whole case, and, if viewed in that light, it would be equally true that there was no question of fact to be submitted to the jury. *But such is not the true construction of the patent, as is obvious from every one of the explanations of the specification. Invention was of such a movable press-block as is described*, having its edge formed to the side of the rail in combination with such other block as described, with its edge of

similar but reversed form arranged as described and combined and operating *in the particular way described* for the special purpose of effecting the desired result."

By holding that Claim 4 of the patent does not describe specifically a straddle-type carrier—the only device shown by the drawings of the patent—thus a carrier embodying four shoes, which, to make the carrier dependable, were, by the improvement, operated *positively and in unison*,—would be violating the rule of interpretation not only of patents but a rule inherent in the interpretation of any written instrument.

The rule of patent interpretation was also stated in *Black & Decker Mfg. Co., et al vs. Baltimore Truck Tire Service Corp.*, 40 Fed., (2d) 910 (C.C.A. 4th); the Court said:—

"It is elementary that the language of the claims is to be construed in the light of the description and drawings" (citing authorities).

The rule was explained by this Court of Appeals in *Diamond Patent Company vs. S. E. Carr Co.*, 217 Fed. 400, 407,

"By resorting to the specifications and the light which they afford on the subject we do not enlarge the claims, but construe them according to their intention as authorized by the decisions above cited."

"No one familiar with the art, after reading the claims, and making the permissible reference to the specification, could have any doubt as to what was the particular thing the patentee claimed as new and what was the relation of each part to the combination."



## WHAT CONSTITUTES INVENTION

A recent Canadian case (*Asten-Hill, Ltd., vs. Ayers, Ltd.*, 2nd. Dominion Law Reports 1939, Page 234) naively states the imponderability of invention. Judge Andrews said:—

“Now in this case, as usual in all cases of this class, the Plaintiff’s counsel have cited to me the well-known (authorities), and they urge me not to be misled by the simplicity of the invention into holding that there is no subject matter; while the Defendants relying on (ther authorities) have warned me against attributing inventive quality to what is a mere workshop improvement. Nobody, however, has told me, and *I do not suppose anybody ever will tell me*, what is the precise characteristic or quality the presence of which distinguishes invention from a workshop improvement. Day is day, and night is night, but who shall tell me where day ends and night begins? \* \* \* The truth is when once it has been found, as I find here, that the problem has waited solution for years, and that the device is in fact novel and superior to what had gone before, and has been widely used, and used in preference to the alternative devices, it is, I think, practically impossible to say that there is not present that scintilla of invention necessary to support the patent.”

In the instant case there is even more than a mere scintilla; the Gerlinger improvement manifests a substantial advance over the old cable-lift carrier.

In *Pearl vs. Ocean Mills*, No. 10,876, in 19 Fed. Cases, PP. 56, 59; it is said:—

“No more difficult task is imposed upon the Court in patent causes than that of determining what constitutes invention, and of drawing the line



of distinction between the work of the inventor and the constructor. \* \* \*

In *Smith et al vs. Woodruff*, 22 Fed. Cases, 703; it is said:—

“The Court is greatly relieved, and will be so all the way up to the Court of last resort, *by presumption in favor of the finding by the (Patent) Office, to which is entrusted the determination of the question of patents.*”

In *Union Sugar Refinery Co. vs. Matthiesen*, 24 Fed. Cases, 686, 688; it is said:—

“No patent is issued without an examination at the Patent Office by persons skilled on the subject \* \* \*. The Commissioner is entrusted by law with the power and duty of granting patents for new and useful inventions, \* \* \* and the *prima facie* presumption is that he correctly performed his duty.”

The decision of the Commissioner of Patents of course, is not entitled to the force of *res adjudicata*, “yet is a determination entitled to the highest respect of the Courts, and should not be reversed except upon the most satisfactory proof.” *Cook vs. Ernest*, 6 Fed. Cases, 389.

In *Cluett, et al vs. Claflin et al*, 30 Fed. 992, the Court in defining the quality of the proof required said:—

“This defence (of lack of novelty) must be established by proof \* \* \* *which satisfies the mind beyond a reasonable doubt.*”

The remarks in the case of *Imhaeuser vs. Buerk*, 101, U. S. 647, to 660, strikingly apply to the instant case.

“It is not pretended that any one of them (the prior patents) embodies the entire invention se-

cured to the complainant in his letters patent. Nothing of the kind is pretended, but it is insisted that each contains some feature, device, or partial mode of operation corresponding in that particular to the corresponding feature, device, or partial mode of operation exhibited in the complainant's patent."

In *Diamond Rubber Co. vs. Consolidated Co.*, 220 U. S. 428, the Court said at 435:—

"Knowledge after the event is always easy and problems once solved present no difficulties, indeed may be represented as never having had any \* \* \* but the law has other tests of the invention than subtle conjectures of what might be seen and yet was not."

In *Loom Co. vs. Higgins*, 105 U. S. 580, 591, the Court said:—

"It is argued \* \* \* that the combination set forth in the 5th claim is a mere aggregation of old devices, already well-known; and therefore it is not patentable. This argument would be sound if the combination claimed by Webster was an obvious one for attaining the advantages proposed,—one which would occur to any mechanic skilled in the art. But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not, for years, occur in this light to even the most skillful persons. It may have been under their very eyes, they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value and to bring it into notice—\* \* \*."

Both the Master and the District Court declared that the patented improvement shows nothing more than the product of a skilled mechanic.

Before a mechanic could *reconstruct* the earlier cable-lift mechanism, so as to make it operate *positively*

*and in unison* he had first to *perceive the necessity* for the change, and then to design the required rebuilding of the carrier.

In *Hobbs vs. Beach*, 180 U. S. 383, 393, the Court remarked that invention consists in *THE IDEA that the change could be made* rather than in making the necessary mechanical changes.

*What is defined by the term "MECHANIC"?* The definition is clearly stated in *Kimball Co. vs. Noesting Pinctaker Co.*, 262 Fed. 148, 150:—

"A mechanic is one who applies his trade by rule or rote and only uses what he learned yesterday to do the work of today in the same old manner. He may do it excellently, BUT if he has not only hindsight, but *insight and fore-sight*, first to comprehend the problem and use even the learning of yesterday to do the new thing in a new way, that mechanic has usually *earned the inventive title.*"

The same distinction between a "*mechanic*" and an "*inventor*" is pointed out in the case of *Hobbs vs. Beach*, just above cited, at Page 393. The construction there involved was the *reconstruction* of an old machine to change its mode of work, and it was there contended that the old machine suggested its *reconstruction* to any skilled mechanic. The Court said:—

"Would the thought enter the mind of the skilled mechanic with the Denniss and York devices before him on his workbench; and *if it did, would it not be a creative thought whose presence would convert the mechanic into an inventor?*"

There is no criticism of the doctrine announced in the cases cited by the District Court, but they have no application to a state of facts here involved.

The conclusion of the District Court on the evidence before it in effect *reverses* the "Benefit of Doubt" doctrine.

Without other prior art before it than such as considered by the Examiner of the Patent Office which prior art manifestly does not show anticipation of the combination described by Claim 4, the District Court set the judgment of the Patent Office aside.

In effect, the District Court, *placed the burden on the plaintiff to convince the Court* that the action of the Patent Office, in allowing Claim 4, was correct.

It is submitted that the decision of the District Court's finding of no invention in the combination stated by Claim 4 of the patent in suit is palpably wrong, and unjustly takes from the plaintiff its patent.



## II.

THE APPELLEES INFRINGED THE  
PLAINTIFF'S PATENT

The finding of defendants' infringement really presents no difficulty. As stated in Applicant's 13th point on Appeal (Tr. 797) :

"13. The District Court erred in failing to find as a conclusion of law that the combination of the load-lifting devices and automatic control thereof employed in the straddle-type carriers and manufactured and sold by defendant, Willamette-Hyster Company, and used by the defendant Clark-Wilson Lumber Company, are in principle of operation and result obtained identical with the combination set forth by claim 4 of the patent in suit, and constitute an infringement thereof."

There is no prior art from which plaintiff's patent is to be differentiated. As above pointed out, the prior cable-lift straddle-type carrier had neither load-lifting and lowering mechanism which operated positively and in unison, nor a control means limiting the lifting and lowering of the load to predetermined levels, nor an automatic brake.

And the control means of the wheel-mounted platform hoist did not suggest the building of a straddle-type carrier. As to this, there is no controversy.

*The combination described by claim 4 is broadly new and the District Court was without authority or justification to interpret the element specifying "automatic means" for moving the clutch to neutral position upon the movement of the load-lifting means to a predetermined extent in either direction as designating specifically a load-actuated up movement stop.*

By such interpretation the District Court wrongfully nullified the plaintiff's patent and exonerated the palpable infringement of the defendants.

## III.

THE DEFENSE OF LACHES AND  
ESTOPPEL IS WITHOUT BASIS

It will suffice to state here Points of Appeal 16, 17, 20 and 21 of those on which Appellant relies:

16. "Error of the Court in failing to find that there is no proof in this case that the delay of plaintiff in bringing suit on its patent was prejudicial to the defendant Willamette-Hyster Company or to defendant Clark & Wilson Lumber Company, in any way, and therefore defendants' plea of laches fails.

17. "The District Court erred in failing to find as a conclusion of law that mere proof of delay of plaintiff in bringing suit on its patent against the defendant Willamette-Hyster Company, who had direct knowledge thereof, and infringed the same in spite of such knowledge, unaccompanied by proof of some injury sustained or disadvantage suffered by defendants by failure to bring suit earlier, does not establish laches.

20. "Error of the Court in failing to find as a conclusion of law that plaintiff is entitled to a decree for injunction and accounting against both defendants.

21. "Error of the Court in denying the plaintiff all relief in the premises."

In short, the alleged Laches and Estoppel are devoid of proof.

The Plaintiff's patent is dated May 29, 1923.

When suit was brought the patent still had four years and about eight months to run. Plaintiff prayed for

injunction against further infringement, and an accounting for past infringement.

Though the plaintiff vigorously prosecuted this suit, it was hindered by the unfortunate state of the District Court's calendar, as above mentioned.

Not until about February 15, 1929, did the infringement by defendant, Willamette-Hyster Co. begin; then it bought out the carrier business of the Willamette Iron & Steel Co. (Tr. 595).

At that time that plaintiff had resumed the making and selling of "mechanical lift" carriers *exclusively*—first delivery was March 1929 (Tr. 228, 481, 953, 961).

*Defendants did not charge plaintiff with any conduct besides mere delay in the bringing of suit.* (Supra p. 33).

Plaintiff denied actual knowledge of the infringement by defendant Willamette-Hyster Company until shortly before this suit was commenced. The circumstances were that plaintiff's sale to an old customer was held up, because defendant Willamette-Hyster Company had insinuated that plaintiff was infringing upon a patent issued to Grab.

The Master stressed in his Report that in the face of the advertising, and competition, between defendant, Willamette-Hyster Company and plaintiff, it must be presumed that plaintiff had knowledge of Defendants' infringement. (Master's Report, Tr. 85)

Conceding this deduction to be justified, it does not prove more than harmless negligence in not suing earlier.

As said in *Taylor v. Sawyer*, 75 Fed. 301, 303 (C. C. A. 3rd.).



*"It has never been held that mere laches, unaccompanied by circumstances which amount to an equitable estoppel, shut out a party from all relief in a court of equity."*

"Knowledge of and long-continued acquiescence by a complainant in an infringement may, in special cases, be fatal on a motion for preliminary injunction, but will not, on a final hearing, prevent the court from granting such relief as may be just and equitable."

The court cited *Kittle v. Hall*, 29 Fed. 508, holding "while long acquiescence might defeat a bill for infringement, no precedent had been discovered for the dismissal of a bill for so short a period as seven years, and that the defendants had not been misled, but knew of the plaintiff's rights."

In *McLean v. Fleming*, 96 U. S. 245, 253, the court said:

"Equity courts will not, in general, refuse an injunction on account of delay in seeking relief, where the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for *past* profits."

The court also cited *Menendez v. Holt*, 128 U. S. 514, 523, in which it was held that,—

"Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long, and *under such circumstances*, as to defeat the right itself. Hence, upon an application to stay waste, relief will not be refused on the ground that, as the defendant had been allowed to cut down half the trees upon the



complaintants' land, he had acquired by that negligence the right to cut down the remainder. \* \* \* Acquiescence, to avail, must be such as to create a *new right* in the defendant. (Citation)—“*Where consent by the owner \* \* \* is to be inferred from his knowledge and silence merely, ‘it lasts no longer than the silence from which it springs; it is in reality no more than revocable license’.*”

The case of Taylor v. Sawyer was cited with approval in Ide v. Trorlicht, Duncker & Renard Carpet Co. et al., 115 Fed. 137 (C.C.A. 8th 1902,) the Court said: Page 148)

“The doctrine of laches is an equitable principle, *which is applied to promote, but never to defeat, justice.* \* \* \*

In the latter case the court called attention to certain dominant facts, which exist also in the instant case.

“There are no unusual circumstances, or conditions in this case which appeal to a court of equity. \* \* \* *Unreasonable delay and the deceitful acts, or silence*, of a patentee which induce an infringer to incur expenses or to become liable to losses and damages which he would not otherwise have suffered may sometimes justly induce a court of equity to stay his suit for an infringement or for an accounting before the time fixed by the analogous statute of limitations has expired. *But delay unaccompanied by such deceitful acts or silence* of the patentee, and by such facts and circumstances as practically amount to an equitable estoppel, will warrant no such action. \* \* \* It is no defense to a suit for an

injunction and an accounting on account of the *continuing* trespasses of an infringer that the latter has been trespassing on the rights of the patentee for years with impunity." (Authorities.)

The doctrine of *Taylor v. Sawyer*, 75 Fed. Super was applied in the case of *Beattie Mfg. Co. v. Smith*, 275 Fed. 164 (C.C.A. 2nd, 1921) in which the Court said: (Page 172)

"Mere laches *unaccompanied* by circumstances which amount to an equitable estoppel, will not shut out a party from all relief in a court of equity. On an application for a preliminary injunction, knowledge of the infringement and long-continued acquiescence therein may be fatal on a motion for such an injunction. However, on final hearing, it will not prevent the court from granting such relief as may be just and equitable."

In *Hamilton Beach Mfg. Co. v. P. A. Geier Co.*, 74 Fed. 2nd, 992 (C.C.A. 7th, 1934) at page 995. The court also called attention to dominant factors such as exist in the instant case:—

The proofs do not show much more than a lapse of considerable length of time, during which the plaintiff may have known of the infringement but did not press it. \* \* \* For the purpose of testing out that defense I would be willing to say here that *the means of knowledge of defendants' infringement were probably open to the plaintiff \* \* \**, but that is not a defense of laches. \* \* \* There is no showing that (*Appellant*) relied upon *Appellee's inactivity* in enforcing the patent or that it has been damaged thereby. \* \* \*

The defendants in the instant case emphatically answered NO when questioned as to whether the plaintiff is to be charged with more than failure "to act against makers and users of infringing carriers" (Tr. 36 and 43.)

In *Northern Pacific Railway Company v. Boyd*, 177 Fed. 801 (C.C.A. 9th)

This court said, (Page 823-4) :—

"The doctrine of laches rests on equitable principles which are neither arbitrary nor technical, and what amounts to laches depends largely upon the circumstances of each particular case. The ultimate inquiry is on which side would fall the balance of justice in sustaining or denying the defense."

"Laches is not like limitation, a mere matter of time; but principally a question of the inequity of "permitting a claim to be enforced—an inequity founded upon a change in the condition or relations of the property or the parties."

And the court in the latter case called attention to a dominant factor which also exists in the case at bar:—

"It cannot be said in this case that the appellant has been prejudiced by the delay, in that it has thereby lost the evidence or means of proving the facts and the circumstances on which its defense on the merit depends."

There is no question here of prior invention, nor loss of evidence, affecting such issue.

The defendants' witness Grab is familiar with all facts and circumstances involved in this case.



In a very recent case, *Hartford-Empire Co. v. Swindell*, 96 Fed. 2nd, 227, 232, (C.C.A. 4th, 1938) the court found:—

“no merit in the defense of laches \* \* \* because there is no evidence that the delay in instituting suit has resulted in injury or prejudice to either of defendants, or that there has been such change in circumstances, as the result of such delay as would render it inequitable for plaintiff to be granted protection by injunction at this time with damages for past infringement. \* \* \*

In the same case the court further said: (P. 233)

*“The statute, since the amendment of March 3, 1897 limits the recovery of profits and damages to those arising from infringement committed within six years prior to the institution of suit 35 U. S. C. A. Sec. 90; and we know of no other period of limitation which can be invoked by an infringer to bar recovery. \* \* \** It is well settled that mere delay short of the statutory period of limitation is not sufficient of itself to bar relief. As well said by the late Judge Walter H. Sanborn in *Drum v. Turner*, 8 cir. 219 F. 188, 198, ‘It is no defense to a suit for injunction and an accounting on account of the continuing trespassing of an infringer that the latter has been trespassing on the rights of the owner of the patent for years with impunity.’”

The cases of *Woodmanse & Hewitt Mfg. Co. v. Williams et al.*, 68 Fed. 489, 492; and *Window Glass Machine Co., et al. vs. Pittsburgh Plate Glass Company*, 284 Fed. 645, 650, cited by the Master and the District



Court are respectively based on "*special circumstances*", but similar circumstances do not exist in the instant case.

*Woodmanse & Hewitt Manufacturing Co. v. Williams*, was distinguished, in the case of *Mills Novelty Company v. Monarch Tool & Mfg. Co.*, 49 Fed. 2nd, Page 28, C.C.A. 6th, 1931, in which the Court said:

"The right to an accounting of damages in equity is given by the statute in a permissive way. The court of equity will exercise its discretion in granting an accounting as well as in passing upon a preliminary injunction, and will consider all the respective equities of the parties. This is well settled; *but for refusing an injunction upon final hearing when the patent has still a substantial term to run, when the legal title to the monopoly and its infringement by defendant have been finally established and when there has been no misleading of defendant, akin to fraud, we find no precedent in the Supreme Court or in this court.*"

*The infringement of defendant Willamette-Hyster Co., consisted of a series of acts—the making and selling infringing carriers within the six-year period.*

The infringement did *not* consist of a single continuous act—like the building of special apparatus installed for more than the 6-year limitation prescribed by the Patent Statute previous to suit.

*Some of the sales made by Willamette-Hyster Co. were just shortly before this suit was brought; and the infringement was thereafter continued; defiantly, until the very day this case was tried.*

\* \* \* \*

The case of *Gillons et al. v. The Shell Co., et al.*, de-

cided by this Court (86 Fed. 2nd 600) although presenting an entirely opposite state of facts than existing in the instant case, harmonizes and exhaustively and comprehensively defines the equitable principles involved in questions dealing with laches and estoppel.

As said in *Menendez v. Holt*, 128 U. S. 514, 514,—

“So far as the act complained of is completed, acquiescence may defeat the remedy on the application of the principle applicable when action is taken on strength of encouragement to do it, but *so far as the act is in progress and lies in the future*, the right to the intervention of equity is not generally lost by previous delay, in respect to which the elements of an estoppel could *rarely* arise.” \* \* \*

And now let us inquire what were the circumstances in the instant case in which the District Court found justification for refusing the plaintiff all relief.

The Master stressed in his report: (Tr. 85)

That the plaintiff by its delay in bringing suit—

“*permitted the Willamette-Hyster Co. to invest large sums of money in plans, equipment, in the manufacture of its carrier.*”

*He omitted calling attention to the fact that these included*

*“plant equipment, materials, labor and development work,”*

(Tr. 36)—the inevitable, normal expenses of any manufacturing enterprise, especially when manufacturing large-sized machines, as here involved.

*Is it not to be assumed that these expenses were fully taken into account when defendant Willamette-Hyster Co. fixed the prices of those 300 carriers which it sold?*

Similar circumstances as here involved were considered by this Court in *Columbia Graphophone Co. vs. Searchlight Horn Co.*, 236 Fed. 135, 139, in which the court said:

“In brief, the answer alleges that because the appellee knew of the alleged infringement, and when the appellant and other refused to desist infringement \* \* \* the present suit is barred by the appellee’s laches. \* \* \* There is no evidence in the case that the appellant relied on the conduct of the appellee and its predecessors in interest, or was thereby induced to spend money to its injury or change its position for the worse. It does not follow \* \* \* that horns were not sold to customers at such a price as to yield a profit to the appellant, even after they have paid royalties thereon to the appellees. \* \* \* The owner’s delay was accomplished by no act to induce the appellant to believe that its infringement was acquiesced in, and by no act which amounts to estoppel.”

P. 140: The bare fact that the appellant and others with full knowledge of appellee’s claim, trespassed upon the rights of appellee for years, is no defense to a suit for an injunction and accounting for the trespass.”

The facts to which defendant, Willamette-Hyster Co. chose to testify were merely *that they sold 300 carriers* which brought it \$2,000,000.00. This fixed the average price of \$6,666 per carrier—more than the price of the Ross carrier (Tr. 572) and more than the price of plaintiff’s carriers (Tr. 401).



*No testimony was given as to what the equipment was which the defendant Willamette-Hyster Company had to use in order to manufacture the infringing straddle-type carriers.*

These facts unquestionably are vital to defendants' defense of laches and estoppel. Why did it withhold the facts?

The market for straddle-type carriers was initially definitely narrow (Grab, Tr. 583). Probably such condition of the market caused the Willamette Iron & Steel Co. to sell its carrier business to defendant, Willamette-Hyster Company.

The question arises, "*When did the market improve?*" This also had direct bearing on the question, *what part of the 300 carriers did the defendant, Willamette-Hyster Co. manufacture and sell, and when did the sales take place?*

It is to be recalled that defendant Willamette-Hyster Co. did not buy out the rights of Willamette Iron & Steel Co., and thus did not begin manufacturing its carriers until about February 15, 1929. Probably the greater part of the 300 carriers which defendant Willamette-Hyster Co. sold was *sold within the six-year limitation.*

Defendant, Willamette-Hyster Co. alone had these facts in its possession. Why withhold these facts? The fair inference is, had the facts been given they would not have been favorable to defendants' contention.

The effect of defendant's, Willamette-Hyster Co.'s, plea of laches is, that since it, and its predecessor, were permitted by plaintiff's delay in bringing suit, to sell



300 carriers, it ought not now be forbidden to continue this business.

This plea is met by analogy with the familiar quotation cited in *Menendez v. Holt*, (128 U. S. 514, 523, *supra*)

“Upon an application to stay waste, relief will not be refused on the ground that as the defendant had been allowed to cut down half the trees upon complainant’s land, he acquired by that negligence the right to cut down the remainder.”

The defendant Clark & Wilson Lbr. Co., the Master said (Tr. 85) is chargeable only with *constructive notice of plaintiff’s patent*. But the plea of *unintentional infringement* of a patent, if to have any force, must be accompanied by a *promise to desist further infringement*. In the instant case the defendant Clark & Wilson Lbr. Co. remained silent. It offered neither excuse nor explanation, nor promises to desist. Instead, it allied itself with defendant Willamette-Hyster Company to obtain acquittal for its trespass by *pleading justification*, based on plaintiff’s failure to bring suit earlier.

The extreme deduction which can be made from plaintiff’s dilatoriness is, it implied a license to use plaintiff’s patent. This license however was revokable, and it was revoked by the bringing of this suit (*Menendez v. Holt*, 128 U. S. 524). From thenceforth both defendants became accountable for their defiant infringement.

The Master reported that since he found no infringement, he considered the question as to the rights of plaintiff to injunction against defendants’ further infringement to be academic (Tr. 86).

But the District Court held:

“Whether or not there was infringement still laches is a complete bar.” (Tr. 142)

And by its conclusion of law No. 11, found the plaintiff

“is guilty of laches for its long neglect to assert any right against these defendants and is barred from any recovery in this suit.” (Tr. 159)

Finally, the District Court makes the following statement in its opinion (Tr. 142):

“It is, however, *in the interest of the public that as much of the art as possible be released from monopolistic control*. While the character of the patent is such it is possible to lock up new developments, damage occurs to the public if another person is permitted over a series of years to place the devices upon the market, while a patentee sits idly by and takes no action.”

While this statement is not quite clear, the point of view taken by the District Court is out of harmony with the theory upon which our entire patent system is founded, that the granting of exclusive rights, for a limited period, to the inventor as a reward for his efforts and contribution, has a *beneficial objective* for the general public in encouraging and promoting progress in the arts.

\* \* \* \* \*

THE RECORD OF THIS CASE IN ITS ENTIRETY MANIFESTS THE INJUSTICE OF THE LOWER COURT'S DECREE.

I. It takes from plaintiff its patent, holding it invalid, not because the invention was anticipated by a structure having the same purpose and effect, but be-

cause the Court was unable to CONCEIVE why it required invention to make the old cable-lift carrier *dependably* operable—something which the District Court assumed any skilled mechanic should have done, but yet was not previously done; and when accomplished by Gerlinger was immediately copied in the Ross carrier, and in the 300 carriers which the defendant Willamette-Hyster Company and its predecessor made and sold.

It is the function of the Patent Office to pass on the inventive character of the improvement for which a patent is solicited. The record here shows that the Examiner of the Patent Office gave the patent claim in question very careful consideration, considered specifically the prior art on which defendants rely, but held that this prior art did not anticipate. The presumption of correctness which attaches to the judgment of the Examiner of the Patent Office is not overcome by contention, or even proof that the question of invention involved is debatable. If debatable the patentee must be given the benefit of the doubt.

II. The lower court in order to avoid holding the patent claim invalid narrowed it by reading into it a specific construction which the plaintiff discovered to be impractical and abandoned after trying out its first carrier; and upon such unwarranted reformation of the patent claim the court held that the defendants did not infringe.

III. The District Court's final conclusion is out of harmony with the settled principle governing laches and estoppel. Not only did the Court deny recovery for defendants' infringement prior to the institution of this

suit, but denied plaintiff *all* relief; held it was *barred* from all aid of the Court, because it had permitted defendants' piracy for some years without bringing suit. And this, *notwithstanding there was no proof of injury or prejudice* to either defendants; the proof shows that the defendants *defiantly* continued their infringement after this suit was instituted; and it is to be presumed, from the evidence introduced and the evidence withheld, that the infringement by defendant Willamette-Hyster Company was greatly to its advantage.

It is submitted that justice and equity require that the decree of the District Court be reversed; that the validity of plaintiff's patent be sustained, that both defendants be enjoined from further infringement, and that they be required to give an accounting for their infringement.

Very respectfully,

THEODORE J. GEISLER,

Attorney for Appellant.





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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

— 4 —  
No. 9342

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DALLAS MACHINE & LOCOMOTIVE  
WORKS, INC., a corporation,  
*Appellant,*  
vs.

WILLAMETTE-HYSTER COMPANY, a  
corporation, and CLARK & WILSON  
LUMBER COMPANY, a corporation,  
*Appellees.*

Appeal from the District  
Court of the United  
States for the Dis-  
trict of Oregon.

Hon.  
James Alger Fee,  
Judge.

APPELLEES' BRIEF.

FILED

MAR 29 1940

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CLERK

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*For Appellees.*



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# United States Circuit Court of Appeals

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WORKS, INC., a corporation,  
*Appellant,*  
*vs.*

WILLAMETTE-HYSTER COMPANY, a  
corporation, and CLARK & WILSON  
LUMBER COMPANY, a corporation,  
*Appellees.*

Appeal from the District  
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trict of Oregon.

Hon.  
James Alger Fee,  
Judge.

## APPELLEES' BRIEF.

### FOREWORD.

That section of the brief for appellant captioned "INTRODUCTORY STATEMENT" is largely argument. It ignores practically every controlling fact in this case. Since appellant has not properly stated the case, appellees will do so.

The attention of your Honors is invited to the fact that appellant's brief makes no attempt, either as contem-

In this brief emphasis is ours unless otherwise stated.

plated by Rule 20. 2.(d) of this Court, or otherwise, to show error in the duly approved fact findings contained in the Master's report (Tr. p. 54) or the specific Findings of Fact (Tr. p. 144) made by the trial judge. Yet such Master's fact findings and such Findings of Fact by the trial judge, if correct, are conclusive of this case. Consequently, summary affirmance of the decree of the lower court is in order. See page 14 of this brief for a detailed discussion of this proposition.

STATEMENT OF THE FACTS.

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Appellant charged appellees with infringement of claim 4 of Gerlinger patent No. 1,457,025 (Ex. Bk. p. 848).

Appellant, a corporation having its principal place of business at Dallas, Oregon, is the owner of the patent in suit. Appellee Willamette-Hyster Company is a corporation having its principal place of business in Portland, Oregon. Its name at one time was Willamette-Ersted Company, and it is the successor to a business in the manufacture and sale of lumber carriers, originated in the year 1926 by Willamette Iron & Steel Works of Portland, Oregon. Appellee Clark & Wilson Lumber Company is a corporation engaged in the lumber business at Linnton, Oregon.

The trial court referred this cause (Tr. p. 52) to its Standing Master in Chancery, who filed a well considered and comprehensive report (Tr. p. 54). Thereafter the cause was exhaustively argued, orally and by briefs, in the trial court, before the Honorable James Alger Fee, who filed a carefully prepared opinion herein (Tr. p. 125). The trial judge also entered an order (Tr. p. 143) setting forth specific Findings of Fact (Tr. p. 144) and Conclusions of Law (Tr. p. 156). The present appeal is from a decree (Tr. p. 160) dismissing the suit.

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The patent in suit (Ex. Bk. p. 848) is entitled "Lumber Carrier." It *exhibits* its alleged invention as the same may be applied to an old and well known variety of vehicle known as a straddle truck. But it *claims* such alleged invention in broad and generic language,—language manifestly intended to dominate the subject matter when applied to any truck or other vehicle in the general



nature of a lumber carrier. See particularly claim 4 in suit (Ex. Bk. p. 855).

Examples of straddle trucks which were well known long before the alleged invention of the patent in suit are shown in Ross patent No. 1,209,209, issued December 19, 1916 (Ex. Bk. p. 1203); Ross patent No. 1,271,947, issued July 9, 1918 (Ex. Bk. p. 816); and Overlin patent No. 1,323,719, issued December 2, 1919 (Ex. Bk. p. 1080).

The essential components of a straddle truck are (A) a self-propelled vehicle which is of inverted U shape in transverse section, in order that it may straddle a load, and (B) an elevator for lifting the load for transportation and for depositing same at its destination. The self-propelled vehicle and the elevator constitute a mobile unit, but they function very independently of each other. On this point the trial judge aptly has said:

“All in all, an elevator is a lifting device and a truck is a carrying mechanism. The function of these mechanisms is independent and diverse. While the form of the truck must be modified to accommodate the elevator and the form of the elevator must be changed to ride upon the truck, the essential function of each respective device remains. The union upon one frame is mechanical. The gearing of the respective devices to one power shaft is convenient but functionally incidental. *When these devices were thus conveniently mounted together, the truck performed no new function.* It carried the load and moved backward and forward. *The elevator performed no new function.* It lifted or lowered the load. Although geared to the same power shaft, these diverse devices did not even act simultaneously. The peculiar qualities of a truck and an elevator were not amalgamated to produce a new or different function or result. A mere aggregation was attained.” (Tr. p. 135.)

The patent in suit is concerned only with alleged improvements in an elevator,—an elevator *exhibited* on a straddle truck but *claimed* in the environment of any

“lumber carrier comprising a frame” (see claim 4, in suit; Tr. p. 855).

In the year 1921 Mr. Gerlinger and the plaintiff-appellant company built their first two lumber carriers of the kind comprising a truck and a load elevator. The first of such lumber carriers is exhibited by Gerlinger patent No. 1,422,958 (Ex. Bk. p. 808). That patent, now expired, never has been involved in this suit. The second of such lumber carriers is exhibited by the patent in suit (Ex. Bk. p. 848). Each of such lumber carriers was very unsatisfactory—a failure—as the record shows.

As to the first of such lumber carriers, *i. e.*, the one of the now expired patent, the patentee Mr. Gerlinger frankly admitted that it was *not* satisfactory and had to be rebuilt (Tr. p. 188). The second of such lumber carriers, *i. e.*, the one of the patent here in suit, also was impractical. Only one machine like the patent was ever built, because its operation developed defects (Judge Fee’s 5th Finding—Tr. p. 146). That machine was furnished to the Willamette Valley Lumber Company (Tr. pp. 192, 193). Of it counsel for plaintiff-appellant, in this court, says:

“The first rebuilt improved straddle-type carrier was sold by plaintiff to the Willamette Valley Lumber Company October, 1921 (Ib. 192, 193). *But this construction was not found practical.*” (Appellant’s Brief, p. 9.)

Thus glaringly it appears that both machines exhibited by the Gerlinger patents were *unsatisfactory* and *impractical*, to say the least.

Late in 1922 or early in 1923 plaintiff-appellant abandoned all pretense of operating under the patent in suit and started to make and sell lumber carriers comprising hydraulic elevators (Tr. p. 227). These hydraulic elevators are radically and fundamentally different from the

elevators of the lumber carriers with which this suit is concerned (Tr. p. 232).

The accused lumber carrier is *superficially similar* to the machine of the patent in suit in the same respects that the machine of the patent in suit is similar to the prior art. But the accused lumber carrier *differs* from the machine of the patent in suit in the same respects that the machines of the prior art differ from the machine of the patent. Therefore, appellees contend, and the trial court held, that appellees' lumber carrier does not infringe the patent claim in suit when such claim is construed and interpreted in such charitable manner as to avoid the prior art (Tr. p. 157). Appellees contend, and the trial court held, that the prior art very plainly and very completely anticipates such claim as written (Tr. p. 157).

Plaintiff-appellant continued to make and sell hydraulic elevator lumber carriers, to the exclusion of all others, until some time in the year 1929 (Tr. p. 255).

*Meanwhile*, (A) defendant-appellee Clark & Wilson Lumber Company, in the year 1923, began, and thereafter continued, to buy and use, and sometimes to build for itself, lumber carriers of the character now charged to infringe the patent in suit, and (B) Willamette Iron & Steel Works, predecessor of defendant-appellee Willamette-Hyster Company, started, in the year 1926, a business in lumber carriers of the character now charged to infringe the patent in suit,—that business which has been continued by Willamette-Hyster Company down to the present day.

Then, in October 1935, plaintiff-appellant, which knowingly, silently and uncomplainingly had stood by for *twelve years* in the case of Clark & Wilson Lumber Company, and for nearly *nine years*, in the case of Willamette-Hyster Company, filed this suit.



Naturally, the defense of laches was pleaded and urged on behalf of both defendants. That defense was sustained (Tr. p. 142).

On the subject of laches the Master, beginning at Tr. p. 79, said:

“LACHES.

In view of the Master's conclusion with regard to infringement, it may seem unnecessary to discuss the question of laches. But, in view of the fact that the court may not approve the Master's finding and recommendation in that respect, he begs leave to report to the court his findings, conclusions and recommendations upon the subject of *undue and inequitable delay*.

Gerlinger's patent in suit, No. 1457025, issued May 29, 1923, on his application filed March 30, 1922. His bill of complaint herein was exhibited October 3, 1935.

As early as *September, 1923*, the defendant Clark & Wilson Lumber Company had purchased two Ross carriers, both of which have been in constant use ever since. These Ross carriers are of a straddle type with load-lifting means mounted in the frame, the lift is positive from four points working in unison; it has a clutch manually operated, which can be placed in neutral, and when in operative position moves the lift in either direction; it has means which, when the lift has reached a pre-determined point in upward or downward movement, throw the clutch into neutral and apply a brake to the load-lifting means. The upward movement is not controlled by the movement of the load. The type of means adopted by Ross differs somewhat in construction from that employed by Gerlinger and from that employed by the defendant Willamette-Hyster Company, but efficiently achieves the desired result. *If defendant Willamette-Hyster Company, infringes Gerlinger, so does Ross.* The [allegedly] infringing device in suit was first designed and constructed by the Willamette Iron & Steel Company in September, 1926. The defendant Willamette-Hyster Company succeeded to the carrier business of

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In the above quoted excerpt from the Master's report small caps emphasis is the Master's.



the former in 1929, and both companies, during their respective periods of operation, *continuously manufactured and sold* the alleged infringing device. The gross amount of defendant's sales of the alleged infringing carrier are approximately \$2,000,000.00.

At least as early as December, 1925 (Exhibit 22) the Ross carrier company advertised its carrier in trade journals, such as 'The Timberman', where it was claimed 'The hoist is positive and uniform at all four POINTS of lift. Automatic cut-outs are provided to prevent damage by unskilled operators'. To the user and to the Ross Company's competitors this could mean but one thing, namely, that means had been provided for automatically disconnecting the source of power from the load-lifting mechanism.

Ross' advertisement in The Timberman of November, 1926, is even more specific. It is there said:

'POWER TAKE OFF.

In constant mesh with transmission gear. *Connected to hoisting mechanism by single disc dry plate clutch, which is controlled by single hand lever for starting and stopping hoist in either direction. Equipped with automatic brake of ample size. Load may be raised or lowered while carrier is in motion. Hoist stops automatically at upper and lower limit of travel.*' (Italics mine.)

Such language, to the trade and to Ross' competitors, is susceptible of but one meaning,—namely that the hoist mechanism had a clutch for connecting and disconnecting the load lifting means from the source of power; that it had an automatic brake and that means were provided for disconnecting the source of power from the hoist at pre-determined points of upward and downward movement.

Gerlinger and the other officers of the plaintiff insist that they had no knowledge that either Ross or Willamette Hyster employed automatic means for disconnecting power from the hoist and automatically applying a brake. Except for the testimony of G. A. Grab, the managing director of the carrier department of the defendant Willamette Hyster Company, there is no DIRECT proof that they had such knowledge. Grab was employed by Gerlinger and the plaintiff

from 1921 to January 1, 1926. He was in charge of its sales and service. He claims that shortly after Clark & Wilson purchased Ross carriers in 1923 he inspected them, observed automatic stops and brakes and reported same on several occasions to the patentee, Mr. Gerlinger. Certainly it is entirely likely that while so employed by plaintiff he became familiar with the construction of the Ross carrier. *It is difficult to believe that he would not have been sufficiently interested in a competitor's product not to make such inspection and ascertain such facts.* Mr. Gerlinger, however, specifically denies that Mr. Grab ever spoke to him about the stop mechanism of the Ross carrier, *although he admits that he may have mentioned the fact that Clark & Wilson had purchased Ross carriers.*

When Grab left the employment of plaintiff it is evident that some feeling of hostility existed between Gerlinger and himself. He immediately obtained employment with one of plaintiff's competitors, the Willamette Iron & Steel Company, and he is now a highly interested witness. For these reasons the Master would hesitate to find that Gerlinger had antecedent knowledge of Ross' stop and brake mechanism based solely upon Mr. Grab's testimony.

However, there are other persuasive facts in the record on this subject. *The market for straddle type carriers is comparatively limited.* The competitive field is largely occupied by Ross, Willamette Hyster and plaintiff. *The competition between them is and has been keen.* These carriers are not machines which are hid away or concealed from public and general observation. *In each type of machine the automatic stops are in plain view and the automatic brake is likewise visible to casual inspection, or, at least, its presence is plainly indicated.* When used, these carriers travel through lumber yards and over loading platforms, largely open to the public and certainly to anyone having occasion to visit the mill plant. *They often travel upon the public highways.*

It is difficult to conceive that under such circumstances any competing manufacturer did not have accurate and complete knowledge of the structure employed by the others. *Each proclaimed the superiority of its product, each was necessarily compelled to explain the particular point of alleged superiority of his*

*device over those of his competitors; each naturally would be curious as to what the competitor had done and of what the new competing models would consist. To believe that plaintiff and its executive officers, its salesmen and mechanical department, were not fully conversant with the details of the structure of the competing machine is to place a heavy burden upon the Master's credulity. To fully accept the denial of knowledge compels one to believe and find that plaintiff in this case failed to do what ordinary prudence, business judgment and common sense would dictate, namely, to avail itself of knowledge which was advertised, and of inspections which were easily and readily available. If it should be conceded that the officers of the company did not know the ACTUAL structural details of Ross and of Willamette-Hyster during all these years, they must have been aware that the Ross and Willamette-Hyster machines embodied automatic means for throwing the clutch into neutral and applying the brake to the load lifting mechanism, and inasmuch as plaintiff asserts that the patent includes ANY means, it follows that they must have been aware that the Ross and Willamette carriers infringed the patent.*

To use the language of Judge Lurton (sitting with J. J. Taft and Hammond) in *Woodmanse & Hewitt Manufacturing Co. v. Williams*, 68 Fed. 489, 492,—

‘Indeed it is not within the range of probability that two rival concerns engaged in selling competitive windmills in the same section of the Union could have been ignorant of the fact that the mills of each contained substantially the same brake mechanism.’

Indulging plaintiff with the possibility that its officers and its assignor might not have had knowledge of defendant Clark & Wilson Lumber Company's alleged infringing use from 1923 until the fall of 1935, still ‘there devolves upon a plaintiff the burden of disclosing the impediments to a earlier action; of showing, if ignorant of his rights, how he had remained in ignorance so long.’;

*Window Glass Machine Co. v. Pittsburgh Plate Glass Co.*, 284 Fed. 645, 650.

This burden, in the Master's opinion, plaintiff has not sustained. By failure to give notice of infringe-



ment and failure to act, it has permitted the defendant Clark & Wilson Lumber Company, during this period of at least *twelve years*, to purchase eleven Ross carriers and several Willamette-Hyster carriers, and it has likewise permitted the Willamette-Hyster Company to invest large sums of money in plans, equipment and in the manufacture of its carriers.

The Clark & Wilson Lumber Company is a purchaser and user. Its knowledge of plaintiff's patent is constructive only. As to it, plaintiff has been guilty of laches of such character that even had the Master found infringement, plaintiff would not be entitled to relief either for accounting or by way of injunction against further use. No patentee should be granted relief who has permitted an ultimate user to expend large sums of money in the purchase of infringing machines and to use them without objection over a long period of years without at any time informing such user that the machine so purchased and used was an infringement of the patent.

The Willamette-Hyster Company stands in a somewhat different position; its managing director Grab knew of the existence, the nature and extent of the patent in suit. By this knowledge it is bound. On the other hand, as the Master holds, plaintiff has failed to sustain the burden of proving not only that it was ignorant of the infringement but why and how, under the circumstances, it could be ignorant of it. He finds, therefore, that it had such knowledge. *It knew that the Willamette-Hyster Company was an active competitor in its field, that it was investing large sums of money in the development, manufacture, sale and distribution of its carriers. It permitted the Willamette-Hyster Company so to do, making no objection whatsoever for approximately nine years.* Its laches, therefore, should prevent its obtaining any accounting for losses, gains or profits, even though plaintiff might otherwise be entitled to an injunction against further infringement." (Master's Report, pp. 79-86.)

And the trial judge, in his independent opinion approving the Master's report, beginning at Tr. p. 141, said:

"This brings up the question of laches. It has been proven that plaintiff after the abandonment of the



load actuated stop manufactured a few carriers and then turned to the exclusive manufacture of hydraulic carriers. The advertisements as to the latter carrier and the continuous output by plaintiff indicate that Gerlinger believed these were the last word in carrier construction. At any rate, in a highly competitive field, the plaintiff entirely disregarded manufacture and use of the machines which it now claims were infringements. In 1935 there were two developments. First, plaintiff went back to the manufacture of the rack and pinion carrier. Second, plaintiff heard that the defendant Willamette-Hyster expected to sue it for infringement. Thereupon, it is claimed for the first time a detailed examination of the carriers made or operated by defendants was made by the agents of plaintiff.

There are three parties concerned in a patent suit, the patentee, the alleged infringer and the public. In order to promote invention it is proper to grant a monopoly. It is, however, in the interest of the public that as much of the art as possible be released from monopolistic control. While the characteristic of the patent is such that it is possible to lock up new developments, damage occurs to the public if another person is permitted over a series of years to place devices upon the market, while a patentee sits idly by and takes no action. Sufficient damage is here shown so that the doctrine of laches is applicable. While the case of *Gillons, et al. v. Shell Co. of California*, 86 F. (2d) 600, may have distinguishing features, the principle is applicable here.

Whether or not there was infringement still laches is a complete bar.” (Tr. pp. 141, 142.)

With respect to this matter of laches the attention of your Honors is also directed to those specific Findings of Fact of the trial judge which are numbered 24 to 33, both inclusive, and which appear at Tr. pp. 153-156.

**Propositions Relied Upon by Defendants-Appellees.**

Defendants-appellees contend :

1. That summary affirmance of the lower court decree is in order because of the failure of plaintiff-appellant to show, or to make any plain attempt to show, error in either the fact findings of the Master or the Findings of Fact by the trial judge.
2. That the single claim in suit is void, in view of the prior art, unless limited and restricted to the specific device which the patent exhibits.
3. That the claim in suit, when limited as it must be limited to save it from invalidity, is not infringed by the accused machine of defendants-appellees.
4. That plaintiff-appellant has been guilty of laches—laches so gross as to bar both injunctive and compensatory relief.
5. That the claim in suit is one of the kind denounced by the Supreme Court in *Bassick v. Hollingshead*, 80 L. Ed. 1251, 298 U. S. 415, and in *Lincoln v. Stewart Warner*, 82 L. Ed. 1008, 303 U. S. 545.

## ARGUMENT.

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### **Plaintiff-Appellant Now Stands Conclusively Bound by the Fact Findings Appearing in the Master's Report and the Specific Findings of Fact Made by the Trial Judge.**

Rule 20 of this Court, which prescribes what an appellant's brief shall contain, provides:

2-d. "In all cases save those of admiralty, or criminal nature, a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged.  
\* \* \* In equity and admiralty cases, and at law when findings are made, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon such exception."

Appellant's brief is devoid of the "specification of errors" required by the first sentence of the above quoted excerpt from Rule 20.

And such brief for appellant does not attempt, in any way whatsoever, to "state as particularly as may be" wherein the fact findings in the Master's report, or the specific Findings of Fact made by the trial judge are erroneous, as required by the next to the last sentence of the above quoted excerpt from Rule 20.\*

Nor does appellant's brief state any "exception to the report and the action of the court upon such exception" as required by the last sentence of the above quoted excerpt from Rule 20.

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\* Only on page 40 of appellant's brief do we find even a quibble concerning the correctness of any finding of the court below. On page 40 appellant directs against Judge Fee a criticism of the pin prick variety because His Honor used the word "went" instead of "had gone"—in a situation where the meaning is clear whichever grammatical form is adopted.

If appellant merely had inconvenienced your Honors and appellee by a technical failure to observe the above quoted rule of this Court, your Honors might be inclined charitably to overlook the circumstance, or to discipline appellant by some action short of an outright dismissal of its appeal or a summary affirmance of the decree of the court below.

But the fact is that appellant, in writing its brief, has chosen, for the most part, to IGNORE those fact findings of the duly approved Master's report, and those specific Findings of Fact of the trial judge, which spelled defeat for the plaintiff in the court below.

We have searched appellant's brief in vain for any direct attempt, or any reasonably plain attempt by indirection, to show that any fact finding, contained in the Master's report, or any of the specific Findings of Fact made by the trial judge, is contrary to the evidence in any material respect.

In this situation appellant is in no position to criticize or attack, *either in its reply brief or at the oral argument*, the controlling facts in this case as found and recorded by the duly approved Master's report and the specific Findings of Fact made by the trial judge.

In *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 369; 71 L. ed. 684, 687, the Supreme Court said:

"While many errors were assigned, some of which were also specified, in general terms, in the defendant's brief in this court, *we confine our consideration of the case in this opinion to the controlling questions which are stated in that brief* to present the chief issues here in controversy, and to which alone the argument in the brief is directed."

And in *Southeastern Express Co. v. Robertson*, 264 U. S. 541, 542; 68 L. Ed. 840, 841 (1924), in which a state statute, which imposed a privilege tax, had been held constitutional by the trial court, the Supreme Court said:

"The ruling in the latter respect is assailed and as-



signed as error in the record *but not in the argument* and we therefore do not discuss it.”

And in *Ewing v. Howard*, 74 U. S. (7 Wall.) 499, 503, 19 L. ed. 293, 295, the Supreme Court said:

“*Neither of the objections taken to the action of the circuit court and embodied in the bill of exceptions are urged in this court, and being in themselves entirely untenable, they must be considered as having been abandoned.*”

And in *United States v. First Wisconsin Trust Co.*, 92 Fed. (2d) 840, 841, the Court said:

“The Government has assigned fifty-two errors, and it claims generally to rely upon all of them. It has discussed but few of them, however, and for that reason *those not discussed will be considered as having been waived.*”

And in *Pickham v. Wheeler-Bliss Mfg. Co.*, 77 Fed. 663, 664, the court said:

“Under the third and fourth heads of the brief are quoted, but without references to the pages of the record where the rulings are shown, specifications of error upon the exclusion of testimony, and upon the giving and refusing of instructions to the jury, but as none of them is supported by argument or citation, or even by a suggestion to enable the court to apprehend the exact question intended to be presented, they must be regarded as waived. There may have been suggestions in support of some of these specifications at the hearing, *but it cannot be permitted to the appellant, as a matter of right, to bring forward in the oral argument questions not presented in the brief, and which by reason of the failure to argue them in the brief the other party was entitled to consider waived.*”

We submit:

1. That the duly approved fact findings of the Master's report, and the specific Findings of Fact made by the trial judge, make out complete defenses for appellee and spell inevitable defeat for appellant.

2. That such fact findings of the Master's report and

such Findings of Fact made by the trial judge are no longer subject to attack—because appellant has elected and chosen not to attack them in its main brief.

3. That in these circumstances the decree of the lower court properly may be and should be affirmed without any study by your Honors of the voluminous testimony and exhibits comprising the record herein.

**Infringement Cannot Be Made Out by Comparing the Accused Machine With a Machine Built by Plaintiff-Appellant, Such as the Machine of Plaintiff-Appellant Containing the Lift Control Stops 90 and 91. The Comparison Must Be Between the Accused Machine and the Machine Disclosed and Claimed in the Patent.**

Plaintiff-appellant is ashamed of the machine which its patent discloses. It is a machine which counsel for plaintiff-appellant admits “was not found practical” (appellant’s brief p. 9).

Throughout the proceedings in the court below the plaintiff-appellant endeavored to keep its patent in the background and carry on the *pretense* that what Mr. Gerlinger invented and patented was a structure like the drawing, Pl. Ex. 6, and the model, Pl. Ex. 13,—exhibits which contain the stop members 90 and 91 which the disclosure of the patent *lacks*.

In the very first sentence of his brief in this court we find counsel for plaintiff-appellant attempting to renew the same pretense. He says:

“This suit is brought against Appellees (defendants) for their infringement of the patent granted to Carl F. Gerlinger, May 29, 1923, No. 1,457,025, *a model of which may be seen in Pl’ffs. Ex. 13* (Tr. 216), on an improvement in Lumber Carrier of the straddle-type.” (Appellant’s brief, p. 1.)

Such Ex. 13 is not a model of the patent disclosure. It

represents an *afterthought* of Mr. Gerlinger, constructed and operating in accordance with the teachings of the prior art. It represents an afterthought which came to Gerlinger when the patented structure "was not found practical." It contains the stop elements 90 and 91.

In this connection the patentee Gerlinger testified:

"Q. Your answer then is that both the model, Exhibit 13, and the structure shown on the chart, Exhibit 6, have a part marked 91; is that right?

A. Yes.

Q. And your patent here in suit does not show that part 91; is that right?

A. That is right. I mean the patent drawing don't show it." (Tr. p. 221.)

And in this same connection the Master, in his report, said:

"Nos. 90 and 91 will not be found in the drawings or specifications of the patent \* \* \*." (Tr. p. 63.)

We urge that your Honors be not misled by the pretense of plaintiff-appellant that the drawing, Pl. Ex. 6, the model, Pl. Ex. 13, or any other drawing or structure embodying the limit stop elements 90 and 91, is representative of the machine of the patent in suit.

Your Honors will perceive, as you get further into this case, that plaintiff-appellant seeks at all times to distract attention from the bail-like member 67, which is the salient and characterizing element of the patent in suit (see Fig. 3 of the patent in suit, Ex. Bk. p. 853). And while endeavoring to soft pedal the element 67, plaintiff-appellant keeps up the pretense that the limit stop elements 90 and 91 are something within the very dubious contribution to progress (or retrogression) which the patent in suit monopolizes. The reason for such tactics is this:

Appellant and appellees in their present-day successful machines use elements functioning like the prior art limit stops 90 and 91. No one, not even plaintiff-appellant, uses



anything like, or corresponding in function with, the bail-like element 67 of the patent in suit.

The authorities in this and other circuits, are overwhelmingly to the effect that infringement depends, not upon what a patentee has *manufactured*, but upon what he has patented.

“And it is axiomatic in the patent law that infringement depends, not upon what is manufactured or sold by the patentee, but upon what he has patented.”

*Magnavox Co. v. Hart & Reno et al.*, 73 Fed. (2d) 433, 445, 446 (C. C. A. 9).

“In passing, I may observe, that some considerable confusion is found in the record, which arises from the fact that counsel, to some extent on both sides, persistently insisted on comparing defendant’s accused device with plaintiff’s commercial device, instead of comparing the accused device with the teaching of the patents in suit, as disclosed by the specifications and claims, or by the claims as read in the light of the specifications. \* \* \* Experience often discloses that commercial devices, alleged to be protected by a patent, or patents, depart substantially from the patent, or patents, themselves. So, commercial devices are not to be compared with commercial devices, but the accused commercial device is to be compared with the claims of the patent in dispute.”

*Hartford-Empire Co. v. Obear-Nester Glass Co.*, 39 Fed. (2d) 769, 771 (C. C. A. 8).

“The test of infringement is, of course, the patent and not the patentee’s commercial construction.”

*Amity Leather Products Co. v. Halvorsen et al.*, 64 Fed. (2d) 793, 796 (C. C. A. 7).

“It may be true that the cases which appellant (patentee) actually manufactures and markets much more closely resemble the defendant’s structure, but its suit is necessarily predicated, not upon what it manufactures, but upon what it has patented.”



*Grand Rapids Show Case Co. v. Weber Show Case & Fixture Co. et al.*, 38 Fed. (2d) 730, 731 (C. C. A. 9).

**An Explanation of the Color Scheme Which Is Common to All of Defendants' Chart Exhibits Appearing in This Brief.**

The single claim in suit is couched in broad and comprehensive terms. While the claim recites but six elements, it will be found that certain ones of these elements include much mechanism when the claim is read upon drawings of any given machine. Moreover, it will be found that the specific mechanisms, which respond to the very broadly recited elements of the claim, vary considerably in the several machines (plaintiff's patented machine; the prior art machines; and the accused machine) with which the claim must be compared.

Therefore, our chart exhibits have been uniformly colored in accordance with a plan which will enable your Honors to apply the broad language of the claim to each chart disclosure without going into (any more than you care to do so) the minutia of the structures under consideration.

The claim in suit breaks down as follows:

A lumber carrier comprising

- (a) a FRAME,
- (b) LOAD LIFTING MEANS mounted therein,
- (c) MEANS FOR TRANSMITTING MOTION FROM A SOURCE OF POWER TO THE LOAD LIFTING MEANS comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction,
- (d) MEANS FOR MANUALLY MOVING THE CLUTCH to operative position,
- (e) AUTOMATIC MEANS FOR MOVING THE CLUTCH to neutral position upon a movement of the load lifting means to a predetermined extent in either direction, and



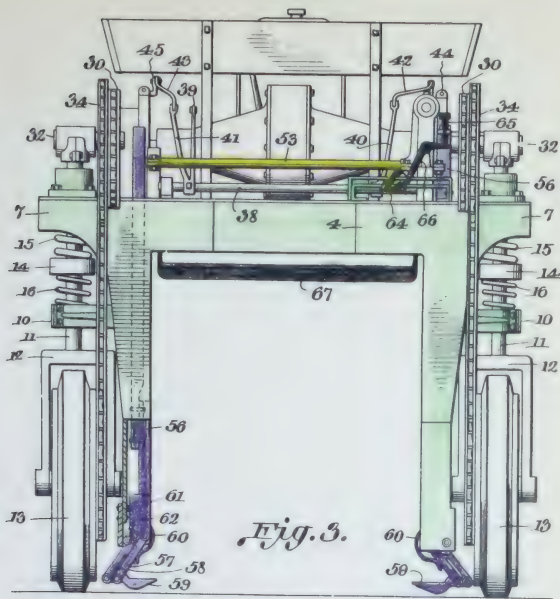


Fig. 3.

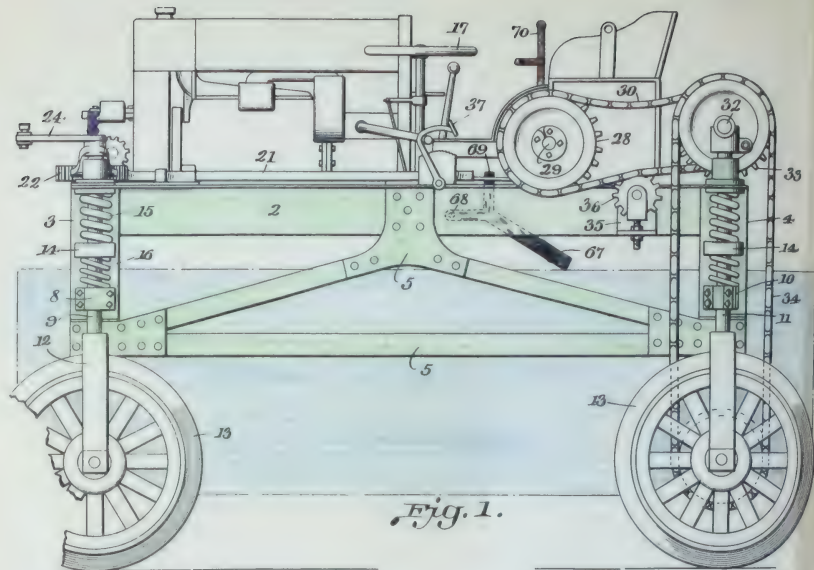


Fig. 1.

GERLINGER

1,457,025

May 29, 1923.

A lumber carrier comprising

- (a) a FRAME,
- (b) LOAD LIFTING MEANS mounted therein,
- (c) MEANS FOR TRANSMITTING MOTION FROM A SOURCE OF POWER TO THE LOAD LIFTING MEANS comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction,
- (d) MEANS FOR MANUALLY MOVING THE CLUTCH to operative position,
- (e) AUTOMATIC MEANS FOR MOVING THE CLUTCH to neutral position upon a movement of the load lifting means to a predetermined extent in either direction, and
- (f) MEANS FOR BRAKING the transmitting means whenever the clutch is moved to neutral position.

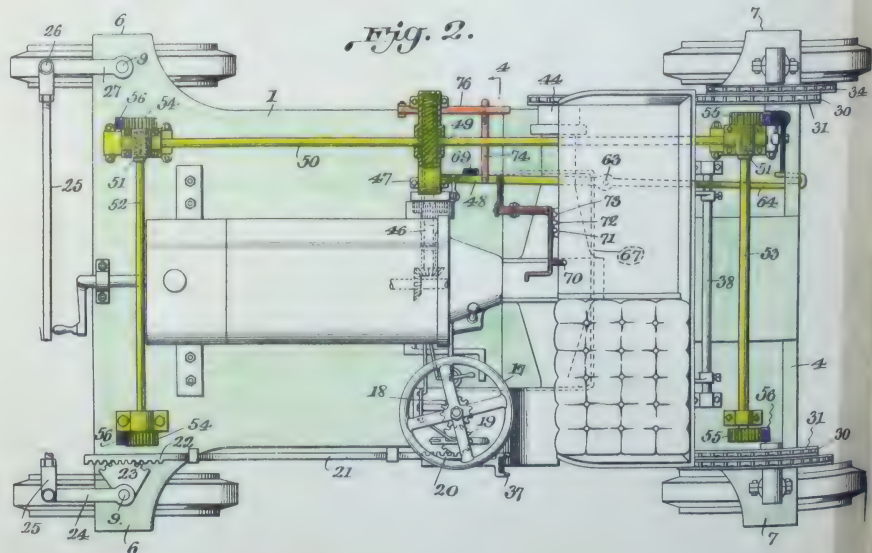


Fig. 2.

(NOTE: The above is Gerlinger's Claim 4 in suit)



(f) MEANS FOR BRAKING the transmitting means whenever the clutch is moved to neutral position.

To each element, as recited by the claim, we have assigned a definite color. And in our charts each instrumentality, or group of instrumentalities, which responds to any given element of the claim bears the color which has been assigned to that element of the claim.

Thus, on each of our charts the machine FRAME is uniformly colored green; the LOAD LIFTING MEANS uniformly is colored purple; the MEANS FOR TRANSMITTING MOTION FROM A SOURCE OF POWER TO THE LOAD LIFTING MEANS uniformly is colored yellow, etc.

This plan of chart coloring was very useful during the proceedings below, and we hope and trust that it will be helpful to your Honors.

### **The Machine of the Patent in Suit Has a Peculiar and Undesirable Mode of Operation.**

The chart appearing opposite this page corresponds with Defendants' Exhibit 25. It bears Figs. 1, 2, and 3 of the drawings of the Gerlinger patent in suit conveniently disposed adjacent a break-down of the Gerlinger claim in suit.

Before we get into a detailed discussion of this chart, we wish to call your Honors' attention to the bail-like member 67 of Figs. 1 and 2. *This is the part of the patented machine which plaintiff-appellant persistently endeavors to soft pedal.* It is the only part of the patented machine which is not anticipated in the prior art. It finds no counterpart in the accused machine of defendants-appellees. It finds no counterpart in the present-day commercial machines of plaintiff-appellant. It characterizes the patented machine with an unsatisfactory, self-destructive and intolerable mode of operation,—a mode



of operation which is not a characteristic of either the accused machine of defendants-appellees, or the latter-day commercial machines of plaintiff-appellant.

Furthermore, and very important to bear in mind, this bail-like element 67, this unfortunate feature of the patented machine, is one of the things which the trial court found needs must be read into the claim in suit by the court if that claim is to be saved from utter anticipation by the prior art (see Opinion, Tr. p. 135; also trial court's Conclusions 3 and 4, Tr. p. 157).

Applying Gerlinger's claim to the Gerlinger drawings as they appear on the chart, we find the FRAME in the several green colored members of the truck chassis.

We find the LOAD LIFTING MEANS in the purple colored mechanism which appears most clearly in Fig. 3.

This mechanism comprises the four vertically moving rack bars 56, provided at their lower ends with peculiarly shaped shoes 59, which are adapted to engage under a load of lumber and elevate it for transportation when the rack bars are lifted. These shoes deposit the load when the rack bars subsequently are lowered. Your Honors will find, when you compare the patented machine with the accused machine, that the LOAD LIFTING MEANS of the latter is radically different from that of the patent. The LOAD LIFTING MEANS of the elevator forming part of the accused machine comprises neither rack bars nor the peculiarly shaped shoes to which we have alluded.

In the Gerlinger machine, as depicted on the chart the MEANS FOR TRANSMITTING MOTION FROM A SOURCE OF POWER TO THE LOAD LIFTING MEANS, comprises all of the mechanism colored yellow. Such yellow mechanism includes a reversible clutch 47 (the structure and mode of operation of which are left pretty much to the imagination), shafting 50, worm gearing 51 and shafting 52, 53 whereby to

transmit power from the vehicle power plant to certain gears 54 and 55 which mesh with teeth on the purple rack bars 56. Associated with the clutch is a lever 48 which is said to have three positions, *i. e.*, a first position in which it puts the clutch 47 in neutral, a second position in which it actuates the clutch in such a way as to cause the lifting of the purple elements of the load elevator, and a third position wherein it causes the lowering of such purple elements of the load elevator.

The MEANS FOR MANUALLY MOVING THE CLUTCH comprises the parts in brown shown most clearly in Figs. 1 and 2. These brown parts include a hand lever 70 which is said to be effective to operate on yellow lever 48 to accomplish the placement of the clutch in its neutral position, or in either selected one of its power transmitting positions.

But when we try to find in the Gerlinger patent drawing the red colored AUTOMATIC MEANS FOR MOVING THE CLUTCH of the claim, we run into difficulty. The patent does show means, which is automatic, for moving the clutch, but it is not means for moving the clutch

“to neutral position upon a movement of the load lifting means to a *predetermined* extent in *either* direction”

as the claim demands. We have here a situation where a patentee has defined an element in language which does not fit his own disclosure,—language, however, which is aptly descriptive of the prior art, as your Honors presently will perceive.

Therefore, we have not seen fit to apply the color red to any of the Gerlinger patent structure appearing on the chart under consideration. On the chart the AUTOMATIC MEANS FOR MOVING THE CLUTCH is shown in black, because it is a means *incapable of functioning* in the manner of the red colored element of the claim.

This black colored clutch moving means comprises the bail-like element 67, to which we have previously alluded as the salient feature of the Gerlinger machine,—the feature which gives the Gerlinger machine its characteristic and intolerable mode of operation. Such black colored clutch moving mechanism also comprises a set screw 65 and a bell crank lever 66, which are most clearly shown in Fig. 3.

The MEANS FOR BRAKING, which is the last element of the claim, is found in the orange colored parts most clearly appearing in Fig. 2 of the chart. None of the witnesses was able to give a very satisfactory “guess” as to how this orange MEANS FOR BRAKING is constructed or how it operates. We may say, however, that it is *supposed* to brake the operation of the parts driven through the reversible yellow clutch 47 when the latter is in its neutral position, and *not* to perform any braking function when the clutch and the other yellow colored mechanism is functioning to drive the purple colored LOAD LIFTING MEANS either upwardly or downwardly.

Now let us see why the machine of the Gerlinger patent has a self-destructive and intolerable mode of operation. The bail-like member 67 is supposed to function (in a manner not entirely clear from the patent drawings or description) to act upon the yellow lever 48 to throw the yellow clutch 47 into neutral position when the bail-like element 67 is engaged and moved upwardly by a load of lumber carried on the shoes 59 of the purple LOAD LIFTING MEANS. But frequently the brown hand lever 70 is actuated to throw the yellow clutch 47 to its load elevating position when there is no load on the shoes 59, or when the load is one of very little height, or when the load is one so piled that it does not engage the bail-like member until after the load has engaged the underside of the green frame. In such cases the yellow components of the lumber carrier just proceed



to destroy the yellow gears 54 and purple rack bars 56,—this being so because power remains supplied to the yellow mechanism at a time when further movement of the purple mechanism can only result in serious injury to the machine.

Your Honors now readily will understand why we have not given any parts of the Gerlinger machine the red color corresponding to element (e) of the claim. The element 67 simply does not function to move the clutch to neutral position upon an *upward movement* of the load lifting means “to a *predetermined extent*.”

When there is no load in the machine the element 67 simply does not function to throw out the clutch—it lets the machine seriously injure itself. Sometimes, even when there *is* a load in the machine, it lets the latter seriously injure itself. Sometimes, when the load is one of considerable height, it functions to throw the clutch to neutral after the purple mechanism is moved to a *minor* “extent” in the upward direction. Sometimes when the load has little height, it functions to throw the clutch to neutral after the purple mechanism is moved to a *major* “extent” in the upward direction. Assuredly the bail-like element 67 is not one functioning to move the clutch to neutral upon a movement of the purple LOAD LIFTING MEANS to a

“predetermined extent”

in the upward direction.

The black screw 65 and the black bell crank 66 seem to be, so far as the record shows, a fairly effective means for moving the yellow clutch 47 to its neutral position when the purple LOAD LIFTING MEANS is moved to a predetermined extent in the downward direction. When the purple rack bars 56 reach approximately the position shown in Fig. 3, the screw 65 engages one end of the bell crank 66, as shown in Fig. 3. Thereupon, the other end of such bell



crank engages the turned-back extremity of the rear portion 64 of the yellow lever 48 to throw the clutch to neutral position.

**The Law of Mechanical Operation, in Accordance With Which Gerlinger's Patented Machine Must Function, Is That the Stop Governing Upward Movement of the Elevator Shall Be Actuated ONLY by the Load.**

The record herein is overwhelmingly to the effect that the law of mechanical operation, which governs the functioning of the machine of the patent in suit, is that the stop governing upward movement of the elevator shall be actuated *only by the load*.

It will later appear to your Honors that the law of mechanical operation, which governs the functioning of the accused machine of defendants-appellees, is that the stop which governs upward movement of the elevator shall be actuated INDEPENDENTLY of any load and REGARDLESS of whether or not there be any load in the elevator.

With respect to the law of mechanical operation which governs the functioning of the machine of the patent in suit—this law which sentenced such machine to eternal oblivion—the duly approved report of the Master says:

“The plaintiff and the patentee built but one machine containing a load-actuated upward movement stop bar. It had defects which in actual operation became obvious. If the load was not of sufficient height to engage bar 67 by the time the rackbars had reached the end of their normal travel, or if the load was not properly distributed on the lift, bar 67 would not operate and *the hoist mechanism would be subject to damage, due to upward movement beyond the designed range, thus either stripping the pinion or the rack teeth.*” (Tr. pp. 62, 63.)

The above quoted excerpt from the Master's report is





amply supported by the record, *e. g.*, by the succinct answer of Mr. Grab appearing at Tr. p. 582, reading as follows:

“A. The load-controlled stop proved very inefficient. We wrecked the lifting mechanism whenever no load was in the machine or if the load was of such shape and size so as to fail to strike the load-controlled stop before the load-lifting means reached its upper limits.”

And such last quoted excerpt from the Master's report apparently is affirmed by appellant's counsel when, in speaking of the only Gerlinger machine ever constructed in accordance with the patent in suit, he says:

“But this construction was not found practical.”  
(Appellant's Brief, p. 9.)

**The Dingee Patent No. 414,380 (Ex. Bk. p. 1104) Completely Negatives Invention in the Truck-and-Elevator Aggregation Recited by Gerlinger's Claim in Suit.**

While the Dingee patent does not purport to show a truck carried elevator, it does establish conclusively that each and every element recited by the claim in suit has, for decades, been well known to builders of elevators.

Incidentally, there is in evidence an operative model, defendants' Ex. 61, which operates in accordance with the teachings of the Dingee patent. When such model was offered in evidence, its several elements were colored in accordance with the color scheme which characterizes the several charts included in this brief (Tr. pp. 627-631).

Appearing opposite this page is a chart corresponding to Defendants' Ex. 60. It presents Figs. 1 and 2 of the Dingee patent in convenient juxtaposition to a break-down of the Gerlinger claim in suit.

With the aid of the chart color scheme, your Honors readily will perceive that the elevator of Dingee exhibits, completely and perfectly, each and every element of the claim in suit.



For a detailed discussion of this Dingee elevator, see the testimony of Mr. Grab appearing at Tr. pp. 622-627.

The trial judge made the following amply supported finding pertinent to the Dingee patent and the elevator disclosed thereby:

“9. That in the prior art the patent to Dingee, No. 414,380, issued November 5, 1889, for Elevator, discloses a manually operated clutch by which power may be transmitted to the hoisting mechanism, and when power is thus applied, upward or downward movement is communicated to the load lifting means. Upon movement of the load lifting means to a predetermined extent in either direction, a projection on the lift engages a stop on the cable by which the clutch is automatically operated to cause the cable to move the clutch into neutral position and to simultaneously apply the brake.” (Findings of Fact, Tr. p. 148.)

This last quoted finding of the trial judge followed some preliminary findings also very pertinent to the Dingee patent, reading as follows:

“6. That the field in which the Gerlinger invention was developed is divided into two parts, namely, that relating to *elevators* or lifting devices, and that relating to self-propelled *vehicles* or carrying devices; *that except as they are disposed on or within the same frame they are entirely independent and the essential function of each respective mechanism remains unchanged*; that the union upon one frame is mechanical; that the gearing of the respective devices to one power source is convenient, but functionally incidental; that when so united and mounted together, the truck performs no new function, but merely carries the load and moves forward and backward. Neither does the elevator perform any new function, but merely lifts or lowers the load as desired; that the peculiar qualities of a truck and of an elevator were not amalgamated to produce any new or different function or result.

7. That the essential elements of claim 4 of the patent in suit relate to the operation of a lifting device; *that in view of the prior art relating to the con-*



1,340,458.

May 18, 1920.

Fig. 1

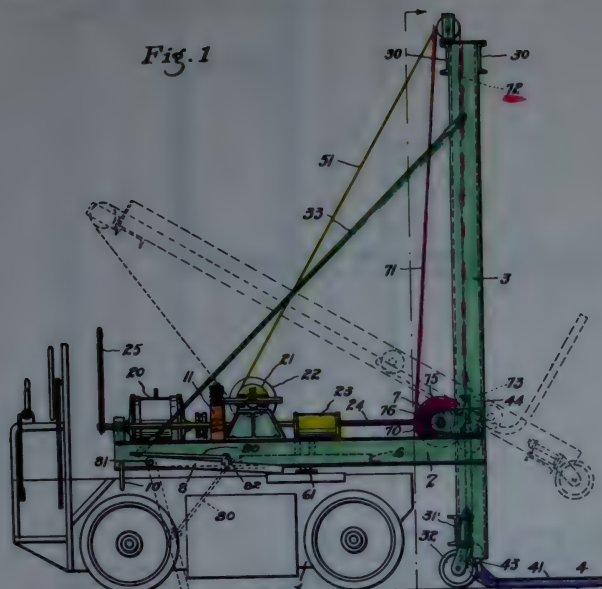


Fig. 2

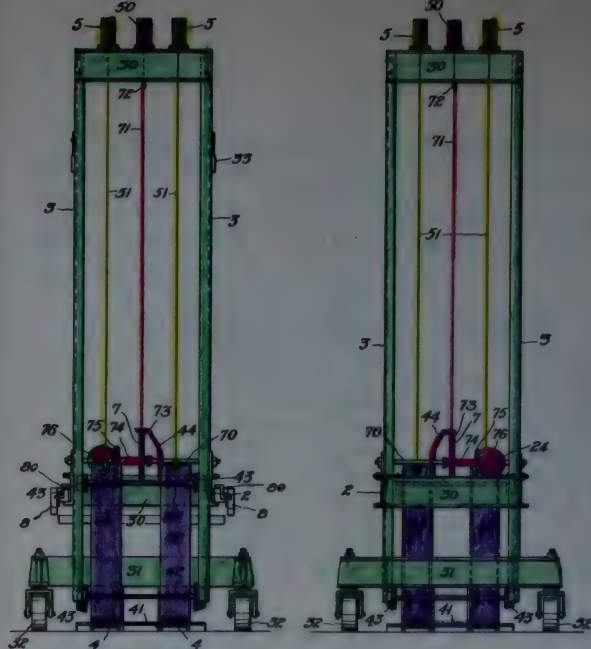
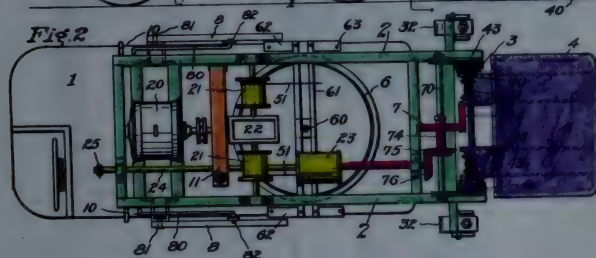


Fig. 3

Fig. 4

A lumber carrier comprising

- (a) a FRAME,
- (b) LOAD LIFTING MEANS mounted therein,
- (c) MEANS FOR TRANSMITTING MOTION FROM A SOURCE OF POWER TO THE LOAD LIFTING MEANS comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction,
- (d) MEANS FOR MANUALLY MOVING THE CLUTCH to operative position,
- (e) AUTOMATIC MEANS FOR MOVING THE CLUTCH to neutral position upon a movement of the load lifting means to a predetermined extent in either direction. and
- (f) MEANS FOR BRAKING the transmitting means whenever the clutch is moved to neutral position.

(NOTE: The above is Gerlinger's Claim 4 in suit)



struction of elevators *every element in the Gerlinger device was old in that art, except the load actuated bar 67 which stopped the operation of the elevator by the upward pressure of the load; \* \* \*.*" (Findings of Fact, Tr. pp. 147, 148.)

Thus it clearly appears that the trial court was required (a) to hold that the Gerlinger claim in suit is *totally invalid* because claiming nothing more than the use of Dingee's elevator (for its old material elevating and lowering purpose) on a lumber truck, *or* (b) to read into the claim the load actuated bar 67, which Dingee did not disclose and which no one (except Gerlinger in his first and only machine constructed in accordance with the patent) *ever used*.

**The Nicholson Patent No. 1,340,458 (Ex. Bk. p. 1114) Also Completely Negatives Invention in the Truck-and-Elevator Aggregation Recited by Gerlinger's Claim in Suit.**

Appearing opposite this page is a chart corresponding with Defendants' Ex. 63. It presents Figs. 1 to 4 inclusive of the Nicholson patent in convenient juxtaposition to a break-down of the Gerlinger claim in suit.

With the aid of the chart color scheme, your Honors readily will perceive that the truck-and-elevator machine of Nicholson, which is is well adapted to carry lumber as anything else, exhibits, completely and perfectly, each and every element of the claim in suit.

For a detailed discussion of this Nicholson machine, see the testimony of Mr. Grab appearing at Tr. pp. 632-634.

With respect to this Nicholson patent the trial judge has adopted a thoroughly justified and conclusive finding, as follows:

"11. That in the prior art the patent to Nicholson *et al.*, No. 1,340,458, issued May 18, 1920, for



Portable Freight Stacking Elevator, discloses a front end carrier with a frame having load lifting means mounted therein, means for transmitting motion from a source of power to the lifting means, and a clutch that can be operated manually, set in neutral or so as to cause the load lifting means to move in either direction. The machine is equipped with automatic means for moving the clutch to neutral position upon movement of the load lifting means to a predetermined extent in either direction, and means for simultaneously applying a brake whenever the clutch is moved into neutral position. *The only material difference in structure between that shown in Letters Patent No. 1,457,025, and the Nicholson machine is that in the latter the frame containing the load lifting means is at the front end of the carrier, whereas, in the patent in suit the load lifting means is mounted between the wheels.*" (Findings of Fact, Tr. p. 149.)

The Nicholson truck-and-elevator machine, like the accused device presently to be described, does lack the *load actuated* member 67 which gives the machine of the patent its peculiar (and unsatisfactory) mode of operation.

With the Nicholson patent before him, the trial judge obviously had but two choices. He was required to hold the claim in suit invalid in view of Nicholson, or, *alternatively*, to limit the claim to the load actuated limit stop member 67 which neither Nicholson, nor any of the other prior art structures, nor the accused machine, includes.

**The French et al. Patent No. 1,360,917 (Ex. Bk. p. 1122) Is Another Item in the Prior Art Which Completely Negatives Invention in the Truck-and-Elevator Aggregation Recited by the Gerlinger Claim in Suit.**

Appearing opposite this page is a chart corresponding with Defendants' Ex. 65. It presents Figs. 1, 2, and 3 of the French *et al.* patent in handy juxtaposition to a break-down of the Gerlinger claim in suit.

1,360,917.

Nov. 30, 1920.

Fig. 2.

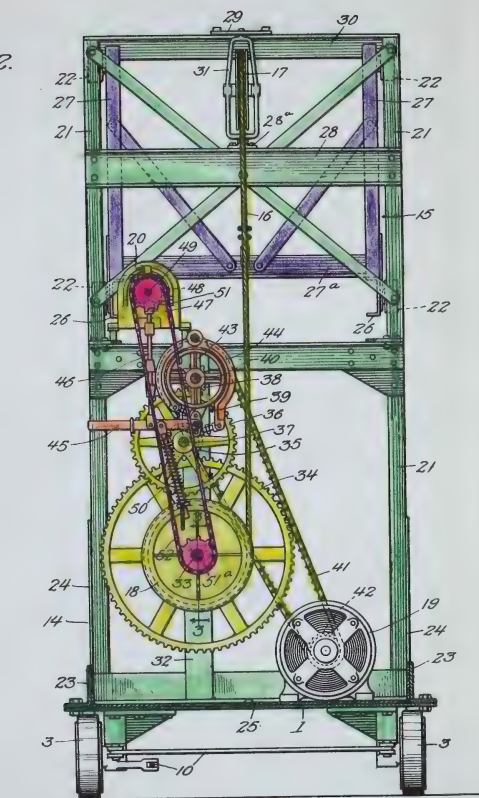
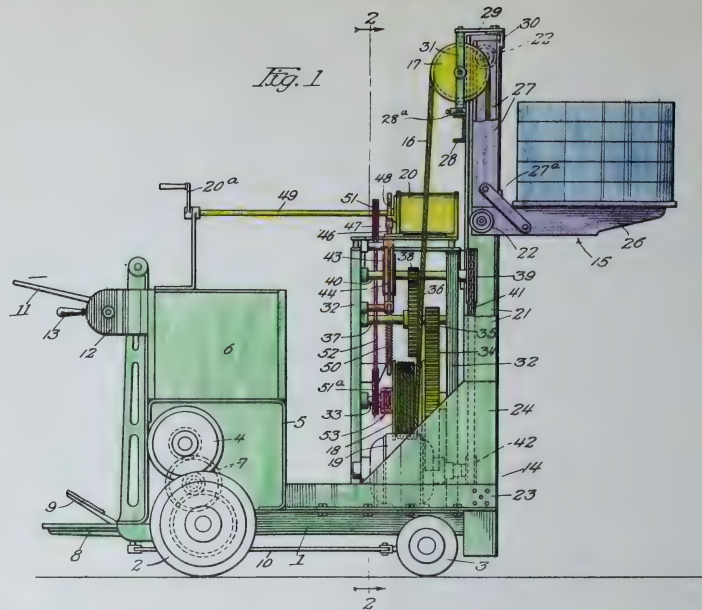


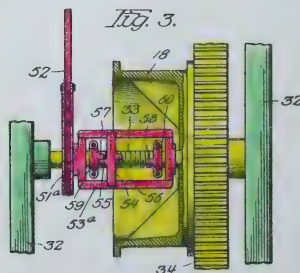
Fig. 1.



A lumber carrier comprising

- (a) a FRAME,
- (b) LOAD LIFTING MEANS mounted therein,
- (c) MEANS FOR TRANSMITTING MOTION FROM A SOURCE OF POWER TO THE LOAD LIFTING MEANS comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction,
- (d) MEANS FOR MANUALLY MOVING THE CLUTCH to operative position,
- (e) AUTOMATIC MEANS FOR MOVING THE CLUTCH to neutral position upon a movement of the load lifting means to a predetermined extent in either direction, and
- (f) MEANS FOR BRAKING the transmitting means whenever the clutch is moved to neutral position.

Fig. 3.



(NOTE: The above is Gerlinger's Claim 4 in suit)



With the aid of the chart color scheme your Honors will have no difficulty in perceiving that the truck-and-elevator machine of French *et al.* presents, completely and perfectly, each and every element of the claim in suit. Obviously, this French *et al.* machine is as well adapted to carry lumber as anything else.

For a detailed discussion of this French *et al.* machine see the testimony of Mr. Grab appearing at Tr. pp. 644-656.

In one respect this French *et al.* patent is peculiarly interesting in this case. Its elevator limit stop mechanism corresponds almost exactly with the limit stop mechanism incorporated in the elevator of the accused machine.

With respect to this French *et al.* patent the trial judge adopted a well grounded finding, as follows:

“12. That in the prior art the patent to French *et al.*, No. 1,360,917 issued November 30, 1920, for Elevating and Conveying Apparatus, discloses the combination with a truck of a load lifting means mounted in a frame on the front end of the truck. The stop which actuates the clutch and throws it into neutral and causes the brake to be applied consists of a traveling nut on a threaded main shaft which engages lugs or collars which operate, by appropriate connection, to throw the clutch into neutral and apply the brake. *The operation is similar to that adopted by the defendants.*” (Findings of Fact, pp. 149, 150.)

With the French *et al.* patent before him, the trial judge had but two courses open to him. He could hold the claim in suit clearly invalid in view of the prior art as exhibited by French *et al.* Alternatively, he could read into the claim a limitation to the load actuated limit stop member 67 which nothing in the prior art exhibits, and which the accused machine does not include. Assuredly appellant has no real cause to complain in that the trial judge held the claim in suit limited to the patentee's exact disclosure, and as thus limited *valid*, instead of invalidating it.



**The Towson et al. Patent No. 1,337,804 (Ex. Bk. p. 1130)  
Is Another Prior Art Disclosure Which Completely  
Negatives Invention in the Truck-and-Elevator Aggre-  
gation Called For by the Gerlinger Claim in Suit.**

Appearing opposite this page is a chart corresponding with Defendants' Ex. 67. It presents Figs. 1, 5, and 6 of the Towson *et al.* patent drawings alongside of a breakdown of the Gerlinger claim in suit.

Aided by the chart color scheme, your Honors will perceive that the truck-and-elevator machine of Towson, *et al.* presents a full and satisfactory response to each and every element specified by the claim in suit.

For a detailed discussion of this Towson *et al.* machine see the testimony of Mr. Grab appearing at Tr. pp. 656-665.

In this Towson *et al.* machine the reversible friction clutch of the Gerlinger patent drawings finds its full, and unquestionable, equivalent in the reversing switch for the electric motor which Towson *et al.* chose to employ as their power source. Also, in this Towson *et al.* machine, the friction brake (of doubtful construction and dubious mode of operation) which the Gerlinger patent attempts to illustrate, finds its full, and unquestionable, equivalent in a magnetic brake functioning when the Gerlinger brake is said to function, and accomplishing precisely the same result which the Gerlinger brake is said to accomplish.

In connection with this Towson *et al.* patent the trial judge made the following fact finding:

"10. That in the prior art the patent to Towson *et al.*, No. 1,337,804, issued April 20, 1920, for Industrial Truck, discloses a self-propelled industrial truck having a load lifting means mounted in the front end thereof, and disclosing automatic means for disconnecting the source of power from the hoisting mechanism and simultaneously applying the brake. Inas-

Fig. 1

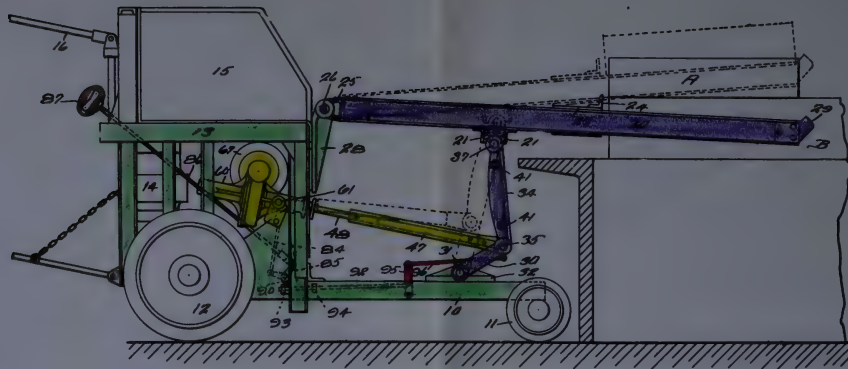
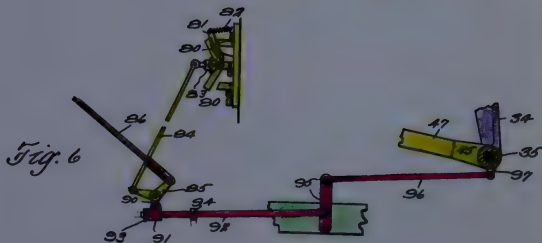
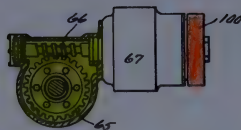


Fig. 5



A lumber carrier comprising

- (a) a FRAME,
- (b) LOAD LIFTING MEANS mounted therein,
- (c) MEANS FOR TRANSMITTING MOTION FROM A SOURCE OF POWER TO THE LOAD LIFTING MEANS comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction,
- (d) MEANS FOR MANUALLY MOVING THE CLUTCH to operative position,
- (e) AUTOMATIC MEANS FOR MOVING THE CLUTCH to neutral position upon a movement of the load lifting means to a predetermined extent in either direction, and
- (f) MEANS FOR BRAKING the transmitting means whenever the clutch is moved to neutral position.

(NOTE: The above is Gerlinger's Claim 4 in suit)



much as the truck is electrically operated, the automatic stop operates to break an electrical contact and thereby disconnect the source of power from the hoisting mechanism.” (Tr. p. 148.)

**The Carr Patent No. 1,407,124 (Ex. Bk. p. 1152) Exhibits Another Prior Art Carrier Which Completely Negatives Invention in the Truck-and-Elevator Aggregation Specified by the Gerlinger Claim in Suit.**

Appearing opposite the next following page is a chart corresponding with Defendants’ Ex. 70. It presents Figs. 1 and 8 of the Carr patent drawings in juxtaposition to a break-down of the Gerlinger claim in suit.

With the aid of the chart color scheme your Honors readily will perceive that the truck-and-elevator carrier of Carr is a full and complete response to the recitals of the claim in suit.

For a detailed discussion of this Carr carrier, see the testimony of Mr. Grab appearing at Tr. pp. 666-671.

This Carr carrier does not comprise a clutch, in the limited sense of that term, but it does present the full equivalent of the reversing clutch of Gerlinger in that it comprises circuit breaking mechanism which connects or disconnects the source of power with and from the load lifting mechanism.

Of this Carr carrier the trial judge has said:

“13. That in the prior art the patent to Carr, No. 1,407,124, issued February 21, 1922, for Elevator Truck, discloses a self-propelled electrically operated elevator truck with a front end lift. The device does not employ a clutch, but means for making or breaking the electrical circuit connects or disconnects the source of power from the load lifting mechanism. It has an automatic brake and by virtue of certain stops the power is disconnected and the brake applied automatically at predetermined upper and lower limits of travel.” (Findings of Fact, Tr. p. 150.)



Carr, like the other prior art structures, and like the accused machine, lacks anything corresponding to the load actuated bar 67 of the patent in suit. But it is, in all respects, a substantive response to the claim in suit. If the bar 67 is not read into claim 4, then such claim is clearly and hopelessly invalid.

**The Grab Patent Drawing Inserted Between Pages 22 and 23 of Appellant's Brief Does Not Represent the Accused Machine.**

At the very beginning of his discussion headed "The Facts as to Infringement" opposing counsel inserts a copy of the drawing of Grab Patent No. 1,838,939 resulting from an original application filed July 23, 1927.

Such Grab patent has no place in a purported discussion of the alleged infringement of the patent in suit by the accused machine of defendants-appellees.

Such Grab patent drawing exhibits a purely *experimental machine* dated more than eight years before the filing of this suit. It differs radically, in structure and mode of operation, from the accused machine as made and sold by Williamette-Hyster Company and as used by Clark & Wilson Lumber Company.

Such early experimental machine depicted in the Grab patent was unsuccessful from an operating standpoint—because it comprised a bar 79 corresponding generally with the bail-like bar 67 which gives the machine of the patent in suit its peculiar, self-destructive, and intolerable mode of operation.

As to this experimental machine, differing as it does so radically from the accused machine, Mr. Grab testified as follows:

"Q. (By Mr. Fryer): You are the G. A. Grab on whose application patent 1838939 issued?

1,407,124.

*Fig. 1.*

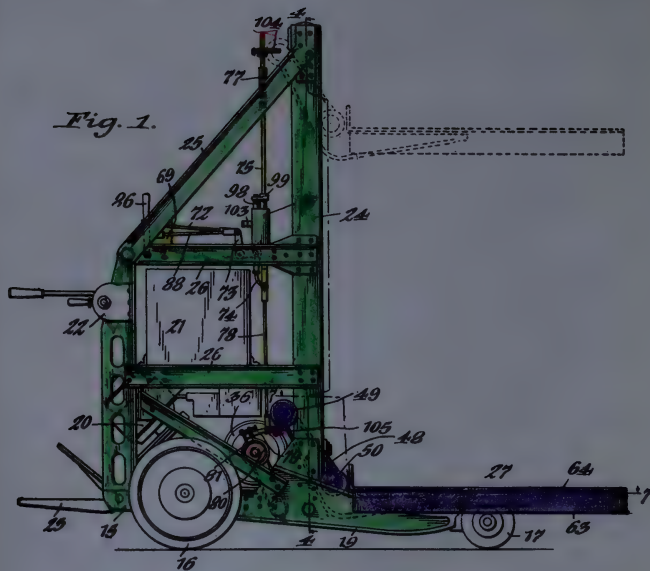
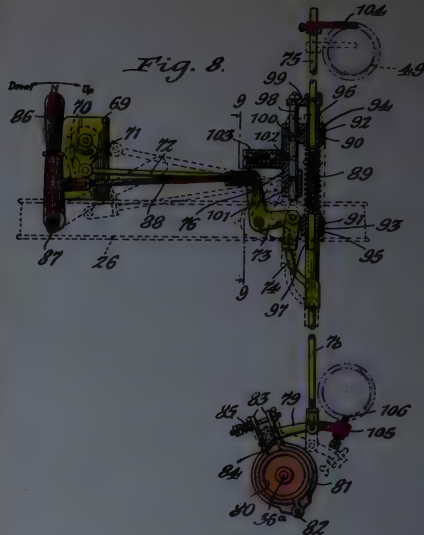


Fig. 8.



(a) a FRAME,  
(b) LOAD LIFTING MEANS mounted therein.

(d) MEANS FOR MANUALLY MOVING THE CLUTCH  
to operative position,

(f) MEANS FOR BRAKING the transmitting means whenever the clutch is moved to neutral position.

(NOTE: The above is Gerlinger's Claim 4 in suit)



A. Yes.

Q. Will you state whether or not you ever built a machine having part 79 of that patent in it as shown on the chart Exhibit 48?

A. Yes, only *experimentally*.

Q. Will you state whether or not that mechanism like the bar 79 and connected instrumentalities was *successful* from an operating standpoint?

A. *No, it was not.*

Q. Will you state whether or not the defendant Williamette-Hyster Company at any time within six years prior to the bringing of this suit made or sold a machine containing in it a part having the construction or operation of the part 79 on Exhibit 48?

A. No, it has not.

Q. In other words, that member in that machine on Exhibit 48 which was designed to be engaged by the load in certain operations *was never put into practical or commercial use by defendant Williamette-Hyster Company within six years prior to the filing of this suit, is that right?*

A. *That is right.*" (Tr. p. 682.)

Clearly the Grab patent drawing can serve no purpose, other than to becloud and confuse the issue, when the question of alleged infringement is being considered.

### **The Accused Machine Follows the Teachings of the Prior Art. Its Elevator Cannot Operate as Does the Elevator of the Gerlinger Patent in Suit.**

The documentary exhibits, *actually* illustrative of the accused machine, which have been referred to in the brief of opposing counsel, are:

The Photo—Plaintiff's Exhibit 35—Ex. Bk. p. 941.

The Photo—Defendants' Exhibit 56-a—Ex. Bk. p. 1011.

The Photo—Defendants' Exhibit 56-b—Ex. Bk. p. 1012.

The Enlarged Manual Drawing No. 2—Plaintiff's Exhibit 34—Ex. Bk. p. 940-A.

Incidentally, the photo Exhibit 56-b, being one of de-



fendants' exhibits, has been colored in accordance with the same plan as were defendants' charts heretofore discussed in this brief. The coloring carried by the manual enlargement, Plaintiff's Exhibit 34, was *not* applied in accordance with such plan.

The accused machine is very different, in both construction and mode of operation, from the machine of the Gerlinger patent in suit. Nevertheless, it responds to the broad and comprehensive language of the claim in suit in exactly the same way as do the prior art machines discussed at earlier points in this brief.

By referring to the photo Defendants' Exhibit 56-a, your Honors will note that the accused machine is of inverted U-shape in transverse section. In other words, it has the inverted U-shape, in transverse section, which has always characterized these so-called "straddle trucks." See for example Fig. 4 of the Ross patent No. 1,209,209, applied for May 11, 1914, granted December 19, 1916 (Ex. Bk. p. 1206).

Referring again to the photo Defendants' Exhibit 56-b, it will be seen that the accused machine does comprise a green colored frame—the usual straddle truck frame.

And, referring to the same photo, it will be seen that the elevator of the accused machine comprises purple colored load lifting mechanism. This load lifting mechanism includes bell cranks. One only of these bell cranks is shown in the photo Defendants' Exhibit 56-b, and the enlarged manual drawing, Plaintiff's Exhibit 34. But in the photo Plaintiff's Exhibit 35, two are shown. There are two on each side of the machine. Depending from the long arm of each bell crank is a "lifting rod," one of which is so labeled in the photo, Plaintiff's Exhibit 35. The lower ends of the lifting rods, on each side of the machine, are connected by a horizontally disposed grappling bar. These

grappling bars are in the nature of angle irons. The short arm of each bell crank is connected with a nut which travels back and forth on a screw shaft forming part of the motion transmitting mechanism presently to be described. In the photo, Defendants' Exhibit 56-b, the nut is colored purple and the screw shaft with which it co-operates is colored yellow.

Thus, so far as mechanical instrumentalities are concerned, the load lifting mechanism of the accused device differs in almost every conceivable respect from the load lifting mechanism of the Gerlinger patent. Whereas the Gerlinger patent comprises rack bars provided at their lower ends with trick shoes 59 (see Fig. 3 of patent in suit) the lower ends of the lifting rods, in the case of the accused machine, are connected with horizontally disposed grappling bars substantially identical with the grappling bars 42 of the old Ross patent No. 1,209,209 (Ex. Bk. p. 1206). And whereas the rack bars of Gerlinger are driven through spur gearing, the lifting rods of the accused machine are actuated by the bell crank, link and nut mechanism to which we have alluded—such parts being colored blue on the photo, Defendants' Exhibit 56-b.

In the accused machine the means for transmitting motion from the source of power to the load lifting means comprises shafts, rods, sprocket wheel and chain, etc., colored yellow in Defendants' Exhibit 56-b. This motion transmitting means of the accused device, has little in common with the corresponding mechanism of the Gerlinger patent in suit, except in that both are old and well known mechanisms and both are constructed and operate in accordance with well known mechanical principles, to perform the old and well known power transmitting function in a truck carried elevator. Such power transmitting means of the accused device does comprise a clutch which,

like the corresponding clutches of the truck carried elevators of the prior art, has a "neutral" position, a "hoisting" position, and a "lowering" position.

In the accused device the usual lever for manipulating the hoist to its several positions is located near the truck steering wheel. It appears in brown at the upper left hand side of the photo, Defendants' Exhibit 56-b.

And the accused device, like the several prior art structures hereinbefore discussed, is provided with automatic means for moving the clutch to neutral position upon movement of the load lifting means to a *predetermined extent in either direction*. Like the devices of the prior art, such "automatic means for moving the clutch" is colored in red on the photo, Defendants' Exhibit 56-b. Its more important parts happen to be colored yellow on the manual drawing enlargement, Plaintiff's Exhibit 34. Incidentally, this "automatic means for moving the clutch", is nothing more nor less than an ordinary limit stop mechanism which has been used for scores of years on elevators, lathes, and other devices to limit the movement, in each direction, of a driven part which moves to and fro, either continuously or intermittently, in the operation of the machine. Your Honors have seen many varieties of this limit stop mechanism in the truck carried elevators of the prior art here presented. There are probably no gadgets, in the whole realm of practical mechanics, which are better known to the every-day-garden-variety of mechanic than are limit stops to throw clutches, to stop movement, or to reverse movement, as may be necessary, in machines of all kinds.

The photo, Defendants' Exhibit 56-b, shows the limit stop mechanism, as well as a photo can, just as it appears in the accused machine. Plaintiff's Exhibit 34, shows the same limit stop mechanism more or less diagrammatically. Let us refer to the latter for a moment.



Referring to Plaintiff's Exhibit 34: When the carrier elevator is lowering its load the screw (2) is so turning as to cause the traveling nut to move to the left. Carried by the traveling nut is a member EB comprising an eye receiving and traveling on the reciprocatory rod GB. When the elevator mechanism is operated sufficiently in the downward direction, the member EB engages the right hand one of the limit stops LS to cause bodily movement of rod GB to the right. Thereupon said rod GB, acting through the mechanism connected therewith, throws the clutch to neutral and returns the manually operated lever (HL) to neutral. It will be understood that there are four of the traveling nuts, each linked to an appropriate bell crank, but that only one of said nuts need carry a member EB forming part of the limit stop mechanism.

And on the upward movement of the elevator, the operation of the limit stop mechanism is as follows:

The screw (2) is so turning as to cause the traveling nut to move toward the left. When the elevator mechanism is moved to its predetermined upward limit, the nut carried member EB engages the left hand one of the limit stop members LS bodily to move the rod GB to the left. Rod GB then acts through its connected mechanism to throw the clutch to neutral and, of course, to return the hand lever HL to its neutral position.

The limit stop mechanism of the accused device, therefore, is like the limit stop mechanisms of the prior art machines previously discussed in this brief, in that it acts effectively to move the clutch to neutral position, when the load lifting means of the elevator has moved to a predetermined extent in the upward direction REGARDLESS of whether or not there is a load in the elevator and REGARDLESS of whether or not that load is a large one or a small one.



Therefore, the operating law of the accused machine is the same law which governs the operation of the prior art machines previously discussed in this brief. That law is that the clutch shall be thrown to neutral when the load lifting means has moved to a predetermined extent, in the upward direction quite independently of any load, and REGARDLESS of whether there be any load in the machine, and REGARDLESS of the size of that load if there be any such.

The machine of the Gerlinger patent in suit, on the other hand, operates according to a different law. On the upward movement of the elevator it throws out the clutch *only in the event* that there is a load in the elevator to do the job,—in other words, *only if* there is a load in the elevator to engage and actuate the bail-like member 67 which is the characteristic and only novel feature of the patented Gerlinger machine.

Therefore, the machine of the Gerlinger patent in suit has its own peculiar mode of operation. The structure of the accused machine is such that it has a different mode of operation, *i. e.*, the mode of operation which characterizes the machines of the prior art. The law governing the operation of the prior art machines, heretofore discussed in this brief, is that the clutch shall be thrown to neutral *whenever* the load lifting devices have moved to a predetermined extent in the upward direction, even if there be no load. That, also, is the law which governs the operation of the accused machine. But it is not the law which governs the operation of the patented Gerlinger machine.

The trial judge has made some definite and well supported findings with respect to the peculiar mode of operation which characterizes the machine of the Gerlinger patent in suit, and the load actuated bar 67 which is accountable for that peculiar mode of operation.

The trial judge has found that the machine of the patent in suit is one

“3. \* \* \* having also load actuated means for automatically moving the clutch into neutral position upon movement of the load to a predetermined extent in an upward direction, said load actuated means comprising in part a pivoted bar engageable by the top of the load as it is hoisted, with suitable linkage for moving the clutch into neutral position and applying the brake; \* \* \*”. (Findings of Fact, Tr. p. 145.)

And findings 4 and 5, as made by the trial judge, read as follows:

“4. That the particular automatic means for moving the clutch to neutral position shown and described in Letters Patent No. 1,457,025 so far as limitation of upward movement is concerned, is the *pivoted bar identified by the reference character 67.*”

“5. *That the patentee and plaintiff built but one machine as shown and described in said Letters Patent No. 1,457,025, having a load actuated pivoted bar for moving the clutch into neutral position and applying the brake; that this bar was operative only when a load was present upon the load lifting means, and was inoperative when the load was not sufficiently high or was so placed or of such a character as not to engage and move said bar \* \* \*.*” (Findings of Fact, Tr. p. 146.)

### **The Accused Machine Is Substantially Identical With Prior Art Machines, and Therefore Cannot Infringe the Claim in Suit.**

In this case it appears that the structure of the accused machine is substantially identical with the structures of prior art machines, that the accused machine operates as do the prior art machines, and that the accused machine *does not operate* as the machine of the patent in suit *must operate*.

Moreover, the evidence in this case makes it crystal clear that, in so far as the subject matter of the suit is

concerned, any mechanic, familiar with the prior art, could have built the accused machine without knowing a thing about the Gerlinger patent in suit or the very impractical machine which it monopolizes.

On this last mentioned proposition the trial judge has found:

“8. That the machines built or operated by the defendants could have been constructed by the use of ordinary mechanical skill by the use of structures disclosed and described in prior patents relating to front end carriers or elevators.” (Findings of Fact, Tr. p. 148.)

It is well settled by the courts, in this and other circuits, that whenever, as in the case at bar, the accused machine is substantially identical with machines of the prior art

- (a) It cannot be the machine of the patent in suit.
- (b) It cannot amount to an appropriation of anything validly covered by the patent in suit.
- (c) It does not infringe.

“The Stafford patent, No. 860,418, for a process of effecting combustion of crude petroleum, consisting in the continuing discharge into a confined area of liquid oil, at a distance from the point of combustion, of an oxygenous fluid under pressure sufficient to effect substantially perfect combustion, held not infringed, in that defendant’s process did not differ from those disclosed by patents prior to plaintiff’s patent.”

*Stafford v. Albers Bros. Milling Co.*, 263 Fed. 86 (Syllabus) (C. C. A. 9).

“If the change from the Foster machine is a substantial departure from a vital element or elements of the patent in suit, or a reversion to the prior art, it cannot be said that plaintiffs’ rights are invaded. The sustaining of a patent upon a differentiation from the prior art does not authorize the successful party to gather to himself a monopoly of what was old when he entered the field.”

*T. L. Smith Co. v. Cement Title Machinery Co.*; 257 Fed. 423, 424 (C. C. A. 8).



“What is old, the public is entitled to use, and a claim couched in general terms must be restricted to such other forms and equivalents. The forms used in the prior art must be protected from inclusion. *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059.”

*Oehrle et al. v. William H. Horstmann Co.* (C. C. E. D. Penn.), 131 Fed. 487, 490.

“Aside from all this, however, there are several reasons why we find that there has been no infringement of any of the claims in suit under the patents that we are now considering. Some of the devices used by both the appellant and the appellees are old; hence there is no infringement.”

*Magnavox Co. v. Hart & Reno et al.*, 73 Fed. (2d) 433, 441 (C. C. A. 9).

Defendant’s machines “are substantially in line with the prior art and therefore do not infringe in any particular.”

*Houston v. Brown Mfg. Co.*, 270 F. 445, 448 (C. C. A. 6).

“Nor is it infringement to use \* \* \* something which was old, and which the public had a right to use, prior to the patentee’s invention, \* \* \*”.

48 Corpus Juris, p. 293, Sec. 490.

### **Infringements Is Not Established by Showing That the Mere Language of the Claim Can Be Applied to the Accused Machine.**

The single claim in suit is couched in broad and comprehensive terms. Indubitably its verbiage reads upon the accused machine in exactly the same way that it reads upon the prior art machines. But despite the fact that the verbiage of the claim may be applied to the accused device, the facts remain that the accused device does not include any load actuated member (like the member 67 of the Gerlinger



patent) for moving the clutch to neutral, and the accused machine, lacking such load actuated member, cannot operate as the machine of the patent in suit must operate.

The one and only thing which any patentee properly can claim as being within his monopoly is that combination disclosed in his patent which is different from any combination in the prior art. And his claim must be so construed as to cover that new thing by which he differs from the prior art, because that new thing, according to the authorities, is the only thing in which he can enjoy a property right under the patent statutes.

The following authorities are directly in point:

“We note that appellant contends that the claims of the patent in suit read upon appellees’ device. We may assume that this is true, especially as to claim 9. *But infringement is not a mere matter of words. Henderson v. Welch Dry Kiln Co.*, D. C. 26 F. 2d 810, 814; *Goodyear Shoe Mach. Co. v. Spaulding*, C. C., 101 F. 990, 994; *Linde Air Products Co. v. Morse Dry Dock & Repair Co.*, 2 Cir., 246 F. 834, 838; *Bird v. Elaborated Roofing Co. of Buffalo*, 2 Cir., 256 F. 366, 373. Here, we hold that the mode of operation is different and that there is no equivalency of means. It is not necessary to discuss the claims separately or in detail. We agree with the finding of the trial court that there is no infringement.

“Decree affirmed.”

*Grant v. Koppl*, 99 Fed. (2d) 106, 110 (C. C. A. 9, September 16, 1938—Wilbur, C. J.).

“Appellant cites, as evidence of infringement, the testimony of his expert witness, George J. Henry, to the effect that some of the claims in suit read upon appellee’s machine. This, appellant contends, was sufficient to require submission of the case to the jury. The contention is rejected. *Infringement is not proved merely by reading a claim upon an accused device. Grant v. Koppl*, 9 Cir., 99 F. 2d 106, 110. The evidence shows conclusively that, properly construed, the claims in suit were not infringed by appellee. That being so, it

is immaterial—if true—that some of the claims read upon appellee's machine."

*McRoskey v. Braun Mattress Co.*, 107 Fed. (2d) 143, 147 (C. C. A. 9—Nov. 3, 1939—Mathews, C. J.).

"An abundance of authority sustains the point that a defendant's device may be within the language of a claim and not be an infringement; that an infringement is not a mere matter of words. *General Electric Co. v. Allis-Chalmers Co.*, 178 F. 273, 276 (C. C. A. 3) Id. (C. C.) 171 F. 666, 669, citing *Westinghouse v. Boyden*, 170 U. S. 537, 18 S. Ct. 707, 42 L. Ed. 1136."

*Henderson et al. v. Welch Dry Kiln Co. Inc.*, 26 Fed. (2d) 810, 814 (Affirmed 39 Fed. (2d) 589 C. C. A. 5)).

"Conceding that the claims in suit may be read on the mechanism of the defendant's machines, it is now well settled that this is not enough to establish infringement. 'It must be determined that the device of the defendant is not merely in words but in fact the invention of the patent.' *Elevator Supplies Co. v. Graham & Norton Co.* 44 F. (2d) 354, 355 (C. C. A. 3); *Westinghouse v. Boyden Power-Brake Co.*, 170 U. S. 537, 568, 569, 18 S. Ct. 707, 42 L. Ed. 1136."

*Complete Calculator Co. v. Monroe Calculating Mach. Co.* 4 Fed. Supp. 842, 847.

"'Infringement should not be determined by a mere decision that the terms of a claim of a valid patent are applicable to the defendant's device. Two things are not precisely similar because the same words are applicable to each. The question of infringement involves considerations of practical utility and of substantial identity, and therefore must be quantitative as well as qualitative.' *Goodyear Shoe Mach. Co. v. Spalding* (C. C.) 101 Fed. 990. We conclude, therefore, that defendant's biograph camera does not infringe claims 1, 2 or 3 of the reissue."

*Edison v. American Mutoscope & Biograph Co.*, 151 Fed. 767, 773, 774 (C. C. A. 2).

See also:

*Silver & Co., Inc. v. S. Sternau & Co., Inc.*, 258 Fed. 448, 451 (C. C. A. 2).

*Cadwell v. Firestone Tire & Rubber Co.* 13 Fed. (2d) 483, 487. Affirmed 23 Fed. (2d) 1000 (C. C. A. 2).

**The Accused Machine Has a Substantially Different Mode of Operation from That of the Patent in Suit, and Therefore Does Not Infringe.**

It is well settled by decisions of the Supreme Court, and of this Circuit and other Circuits, that a claim for a machine characterized by one definite mode of operation cannot be infringed by a machine for a different mode of operation.

In the machine of Gerlinger's patent, the clutch *may be* moved to neutral during the upward movement of the load lifting means, by engagement of a load with the load actuated stop member (67). If there is no load, or if the load is of such size or so located that it cannot be engaged by the load actuated member, there is no movement of the clutch to neutral.

In the accused machine the clutch *always* is moved to neutral at a predetermined point in the upward movement of the load lifting means, *independently* of any load and *regardless* of whether there be any load in the load lifting means. The accused machine does not embody any load actuated stop member because its mode of operation, being different from that of Gerlinger's patent, does not require any such instrumentality.

While the verbiage of the claim in suit may be broad and comprehensive enough—vague enough—to describe the accused machine, there is still no infringement. This is so because the mode of operation of the accused machine is not the mode of operation of Gerlinger's patented machine.



“The patentee may bring the defendant within the letter of his claims, but if the latter has so far changed the principle of the device that the claims of the patent, literally construed, have ceased to represent his actual invention, he is as little subject to be adjudged an infringer as one who has violated the letter of a statute has to be convicted, when he has done nothing in conflict with its spirit and intent. ‘An infringement,’ says Mr. Justice Grier in *Burr v. Duryee*, 1 Wall. 531, 572, ‘involves substantial identity, whether that identity be described by the terms, “same principle,” same “modus operandi,” or any other.’ ”

*Westinghouse v. Boyden Power Brake Company*,  
170 U. S. 537, 568 (Certiorari to C. C. A. 4).

“ ‘If the device of the respondents shows a substantially different mode of operation, even though the result of the operation of the machine remains the same, infringement is avoided.’ *Cimiotti Unhairing Co. v. American Fur Ref. Co.*, 198 U. S. 399, 414, 25 Sup. Ct. 697, 702 (49 L. ed. 1100). ”

*Riverside Heights Orange Growers’ Ass’n. et al. v. Stebler*, 240 Fed. 703, 710 (C. C. A. 9).

“Plaintiff attempts to show infringement by the defendant by trying to literally read claims 9, 10, 11, and 15 on the defendant’s structure, but this does not seem to me to be the proper test in the suit at bar, *because even though the plaintiff could bring the defendant within the letter of the claims of the patent in suit, the defendant could not be adjudged an infringer if it has so far changed the principle of the device that the claims of the patent, literally construed, have ceased to represent the actual invention of the patent in suit.* *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 568, 18 S. Ct. 707, 42 L. Ed. 1136.”

*Cadwell et al. v. Firestone Tire & Rubber Co.*, 13 Fed. (2d) 483, 487 (Affirmed, 23 Fed. (2d) 1000 (C. C. A. 2)).



**It Is the Duty of the Court to so Construe the Language of the Claim That It Will Not Describe or Include Any Prior Art Structure. (When So Construed the Claim Does Not Describe the Accused Machine.)**

We have shown your Honors that Gerlinger's claim in suit meets a complete response in each of several patents of the prior art,—also that the claim, as it appears in the patent in suit, defines nothing of an inventive character over or beyond what was old and well known in the prior art. Thus we have demonstrated the soundness of that conclusion of the trial court which reads as follows:

“2. That the invention defined by claim 4 of the patent in suit was not novel or patentable at the time of the alleged invention thereof by Carl F. Gerlinger, and that the subject matter of said claim and all material and substantial parts thereof had been known, used, invented and described and published in and by the following United States Letters Patent prior to the alleged invention or discovery thereof by the said Carl F. Gerlinger and for more than two years prior to the date of filing of the application for said patent:

Dingee	414,380	Nov. 5, 1889
Towson, <i>et al.</i>	1,337,804	Apr. 20, 1920
Nicholson, <i>et al.</i>	1,340,458	May 18, 1920
French, <i>et al.</i>	1,360,917	Nov. 30, 1920
Carr	1,407,124	Feb. 21, 1922.”

(Tr. pp. 156, 157.)

On the basis of the foregoing conclusion, which undoubtedly is a correct and amply supported one, the trial court would have been justified in adjudging the single claim in suit to be wholly and hopelessly invalid.

But the facts in this case, and the authorities, afford ample justification for holding the claim in suit very narrowly valid,—valid only when limited to the particular machine disclosed and described in the patent, *i. e.*, that

particular machine which comprises *inter alia* the load actuated stop member 67.

On the basis of the facts of record, the trial judge found:

“7. That the essential elements of claim 4 of the patent in suit relate to the operation of a lifting device; *that in view of the prior art relating to the construction of elevators every element in the Gerlinger device was old in that art, except the load actuated bar 67 which stopped the operation of the elevator by the upward pressure of the load; \* \* \**” (Findings of Fact, Tr. pp. 147, 148.)

And the trial judge also found:

“14. That in no one of the prior art patents is there shown or described automatic means for moving the clutch to neutral position *which is dependent upon the presence of a load upon the load lifting means, and that only in this respect, i. e., the load actuated factor, does the means shown and described in Letters Patent No. 1,457,025 differ from the disclosures of the prior art.*” (Findings of Fact, Tr. p. 150.)

And the trial judge also found:

“18. That that which was in fact the invention of the patentee Carl F. Gerlinger was an automatic stop *actuated by the load itself in upward movement*, and an automatic stop controlling the downward movement of the kind and character shown by his drawings and specification.” (Findings of Fact, Tr. p. 152.)

The above quoted findings amply are supported and justified by the evidence. Consequently, the trial judge was forced to the conclusion that the claim in suit

“to be construed as valid, must be restricted to the particular form of device disclosed and described in the drawings and specification of the Gerlinger patent.” (4th Conclusion of Trial Judge, Tr. p. 157.)

This means, of course, that the claim must be limited and restricted to the one thing which Gerlinger had con-

tributed to the art (although it was of practically no value), *i. e.*, the *load actuated* device for moving the clutch.

That the trial judge was justified in thus limiting and restricting the claim in suit in order to save it from total invalidity, is shown by the following authorities:

“It is unnecessary to do more than refer to the proposition that the claims must be so interpreted as to give them a valid meaning, if possible, and that, if they would be rendered invalid by an interpretation so broad as to cover the defendant’s structure, it is to be presumed that the plaintiff, in using the language which he put in the claims and which was allowed by the Patent Office, was describing that which can be held patentable; in other words, that the claims must be limited to the patentable invention, even though reference to the specifications, drawings, and prior art is had, in order to learn the limitations referred to.”

*F. N. Burt Co., Limited v. W. C. Ritchie & Co.*,  
251 Fed. 909, 913.

“While it is true that courts will not ordinarily interpret a positively recited generic expression as limited to the precise instrumentality disclosed by the patent, they will do even this where such narrow interpretation is necessary to distinguish the claim from the prior art and uphold the validity of the claim. *International Banding Mach. Co. v. American Bander Co.*, 9 Fed. (2) 606, 608 (C. C. A. 2).”

*Black & Decker Mfg. Co., et al. v. Baltimore Truck Tire Service Corporation*, 40 Fed. (2d) 910, 914 (C. C. A. 4).

“And, where necessary to uphold the validity of the patent, the court will construe even positive generic expressions as limited to the precise instrumentality disclosed by the patent. *Black & Decker Mfg. Co. v. Baltimore Truck Tire Service Corporation* (C. C. A. 4th) 40 F. (2d) 910. When the claims of the Tomlinson patent are limited to the mechanism de-



scribed in the specification and drawings of that patent, they are clearly not infringed by the machines of defendants.”

*Demco, Inc., et al. v. Doughnut Mach. Corporation. Joe-Lowe Corporation, et al. v. Same,*  
62 F. (2d) 23, 25 (C. C. A. 4).

“It is the duty of the court to read a claim in the light of the entire disclosure of the patent as a whole. It will interpret an expression positively recited in the claim as satisfied by any suitable instrumentality capable of performing the stated function successfully, unless, by so doing, violence to some other patent may be committed. It should never interpret a positively recited generic expression as limited to the precise instrumentality disclosed by the patent, except where such narrow interpretation is necessary to distinguish the claim from the prior art. In such cases, the courts will always do so in order to uphold the validity of the claim where that is possible.”

*International Banding Mach. Co. v. American Bander Co., Inc.,* 9 Fed. (2d) 606, 608 (C. C. A. 2).

“It seems quite clear that the idea of a protected casing for a pump shaft without restrictive interpretation would contain no novelty and would not be patentable, and, if this element in the patent is given the unrestricted meaning that its language admits of, it would destroy the claim. The contention of the defendant is that it should be given the unrestricted generic meaning suggested by its broad language, and that of complainant, that the specifications should be looked to to interpret the claim, and that it should be held to mean only a protective casing of the kind and with the functions set out in the specifications. It seems that the complainant's contention is supported by the authorities cited in his supplemental memorandum and that the argument that the patent granted by the government should be construed so as to prevail rather than be forfeited, since that must have been the intention of the Patent Office, is a sound one, for limiting the breadth of the language



of the claim to the disclosure of the specifications of the patent, if necessary to sustain the patent.”

*Van Ness v. Layne, et al.*, 213 Fed. 804, 807, 808 (C. C. A. 5).

And since defendants’ accused machine does not comprise any automatic stop actuated by the load itself in upward movement, it follows that the trial judge unquestionably was correct when he concluded:

“That claim 4 of the patent in suit is so restricted and limited by the disclosures of the prior art that it does not cover the structure of the carriers manufactured and sold by the defendant Williamette-Hyster Company, or used by the defendant Clark & Wilson Lumber Company.” (Conclusions of Trial Judge, Tr. pp. 157, 158.)

### **An Additional Reason Why the Trial Judge Was Required to Limit and Restrict the Claim in Suit to the Particular Device Disclosed in the Gerlinger Patent.**

During the proceedings before the Master counsel for plaintiff-appellant admitted that the elevator carrying truck shown in defendants’ pamphlet, Exhibit 41, and defendants’ photo exhibits 42 and 43 (Ex. Bk. pp. 945, 948 and 949) is *not* an infringement of claim 4 in suit (Tr. p. 444). And yet the machine of such exhibits is a complete response to claim 4. The color scheme of such exhibits is the same as the one used in defendants’ charts appearing in this brief. Therefore, your Honors will experience no difficulty if you care to apply the claim to the machine depicted by such exhibits 41, 42, and 43. On this point the Master said:

“The plaintiff has to a large degree confined the field of inquiry and consideration by stipulating that the defendant’s front-end hoist does not infringe the patent.

“This carrier (shown in Exhibits 41, 42 and 43) is a

carrier adapted to hoisting, transporting, lowering and depositing lumber. It comprises (1) a frame, (2) load lifting means mounted therein, means for transmitting motion from a source of power to the load lifting means comprising (3) a clutch that can be operated manually and set in neutral position or so set as to cause the load lifting means to move in either direction, (4) means for manually moving the clutch to operative position, (5) automatic means for moving the clutch to neutral position upon movement of the load lifting means to a pre-determined extent in either direction and means for braking the transmission means whenever the clutch is moved to neutral.

*"In fact many of the parts comprising the automatic stop and braking means are interchangeable with those on the straddle type carrier manufactured by defendant, which plaintiff contends infringes his patent."* (Master's Report, Tr. pp. 72, 73.)

And on this same point the trial judge has found:

"17. That because of the record admission by the plaintiff during the course of the trial that defendant Williamette-Hyster Company's front end carrier shown in photographs identified as defendants exhibits 42 and 43 does not constitute an infringement of claim 4 of the patent in suit, there being verbal correspondence between the claim and the said front end carrier, it follows that the invention defined by claim 4 of the patent in suit must be restricted to the form of load actuated mechanism for moving the clutch shown and described by the patentee Carl F. Gerlinger."

"18. That that which was in fact the invention of the patentee Carl F. Gerlinger was an automatic stop actuated by the load itself in upward movement, and an automatic stop controlling the downward movement of the kind and character shown by his drawings and specification." (Findings of Fact, Tr. pp. 151-152.)

Thus on the admission of counsel for plaintiff-appellant the claim in suit does not cover a machine on which it clearly reads,—a machine which, as a matter of fact, has

parts which are *interchangeable* with that one of the Williamette-Hyster machines which plaintiff-appellant has chosen to charge with infringement of the patent in suit.

The claim in suit reads upon the machine of Exhibits 41, 42, and 43 in the same way that it reads upon the accused machine. Each and every word in the claim has the same meaning when applied to either of such machines that it does when applied to the other.

Since counsel disavowed the apparent breadth of the claim in suit, the court naturally restricted and limited the claim to the particular machine shown in the patent drawings,—that machine which comprises, *inter alia*, the load actuated stop member 67 which was Gerlinger's only novel contribution to an otherwise very old aggregation of truck and elevator elements.

Assuredly the trial court did not err in so doing.

**The Defense of Invalidity for Lack of Invention and the Evidence Required to Establish It Are Separate and Distinct from the Defense of Anticipation.**

As the above proposition received some discussion in the proceedings before the trial court, we now cite our cases in support thereof:

*Thompson v. Boisselier*, 114 U. S. 1, 11, 12, 13.

*Gardner v. Herz*, 118 U. S. 180, 190, 191, 192.

*Klein v. City of Seattle*, 77 Fed. 200, 204, 205 (C. C. A. 9).

*Keszthelyi v. Doheny Stone Drill Co.*, 59 Fed. (2d) 3, 8 (C. C. A. 9).

*Reinharts, Inc. v. Caterpillar Tractor Co.*, 85 Fed. (2d) 628, 630 (C. C. A. 9).



**The Prior Art in Evidence Is Analogous to the Art to Which the Patent in Suit Pertains and Is Wholly Adequate to Show Lack of Invention in the Combination of the Claim in Suit.**

In this case counsel for plaintiff-appellant has taken the position, which to us seems quite absurd, that a truck and elevator aggregation, suitable for carrying lumber, which happens to be called a "lift truck," is not in an art analogous with a truck and elevator aggregation, which happens to be called a "straddle truck."

In this connection the attention of your Honors is called to the following cases and the analogies of which they treated:

Concrete Mixer and Improvement in Apparatus for Mixing Tea and Other Material Held to Be in Analogous Arts.

*Ransome Concrete Machinery Co. v. United Concrete Machinery Co.*, 177 Fed. 413 (C. C. A. 2).

Patent for Preserving Fish Held Invalid Over Patent for Corpse Preserver.

*Brown v. Piper*, 91 U. S. 37.

Apparatus for Elevating and Distributing Concrete or Other Plastic Material Held Devoid of Invention in View of Similar Apparatus for Handling Grain, Coal, etc.

*Concrete Appliances Co. et al. v. Gomery et al.*, 291 Fed. 486 (C. C. A. 3); affirmed 269 U. S. 177.

Child's Savings Bank Anticipated by Animal Trap.

*W. F. Burns Co. v. Mills et al.*, 143 Fed. 325-328 (C. C. A. 7).

Patent for Drive Gearing for Speedometer Held Void for Lack of Invention in View of Prior Use of Similar Device in Dental Machines, Shearing Machines, Etc.

*Warner Instrument Co. v. Stewart & Clark Mfg. Co.*, 185 Fed. 507 (C. C. A. 7).



Patent for Apparatus for Pasteurizing Beer Held Anticipated by Apparatus for Curing Fish.

*Model Bottling Machinery Co. v. Anheuser-Busch Brewing Ass'n.*, 190 Fed. 573 (C. C. A. 8).

Portable Elevator Intended Particularly for Elevating Commodities in Sacks, Bales, Etc., Held Devoid of Invention in View of Straw Stacker.

*Brown Portable Elevator Co. v. Interior Warehouse Co.*, 234 Fed. 649 (D. C. Oregon).

**Those of the Prior Patents in Evidence Which Were Not Pleaded in the Answer But Offered to Show the State of the Art Are Competent and Relevant Evidence of Invalidity Because of Lack of Invention.**

Since the above proposition is one which was accorded some discussion in the trial court, we are citing our authorities in support of it.

*Myers v. Sternheim*, 97 Fed. 625, 626 (C. C. A. 9).

*Barkis v. California Almond Growers' Exchange*, 17 Fed. (2d) 327, 328.

*United States Consol. Seeded Raisin Co. v. Selma Fruit Co.*, 195 Fed. 264, 267, 268 (C. C. A. 9).

*Johnson v. Lambert*, 234 Fed. 886, 888, 889 (C. C. A. 2).

*Jones v. Cyphers*, 126 Fed. 753, 754, 755 (C. C. A. 2).

*Dunbar v. Myers*, 94 U. S. 187, 198, 199.

**The Introductory Clause of the Claim in Suit Is Not an Element of the Claimed Combination and Does Not Serve to Differentiate Such Combination from the Prior Art.**

Counsel for plaintiff-appellant seems to take the unusual position that the words "A lumber carrier," constituting the introduction to claim 4 in suit, have the dual function

of (1) carrying into that claim anything and everything, patentable or otherwise, which is common to the drawings of the patent in suit and the accused machine, and (2) of excluding from the claim anything and everything in the disclosure of the patent in suit which is not found in the accused device.

Therefore, we cite our authorities showing that such introductory words have no such effects as counsel for plaintiff-appellant seems to attribute to them.

*Eclipse Mach. Co. v. J. H. Specialty Mfg. Co.*,  
4 Fed. Supp. 306, 315.

*Langmuir v. DeForest*, 18 Fed. (2d) 345, 346;  
affirmed 21 Fed. (2d) 918 (C. C. A. 3).

*W. W. Sly Mfg. Co. v. Russell & Co.*, 189 Fed.  
61, 65 (C. C. A. 6).

*Diamond Drill & Machine Co. v. Kelly Bros.*, 120  
Fed. 289, 293.

*Frederick R. Stearns & Co. v. Russell*, 85 Fed.  
218, 224 (C. C. A. 6).

*Ford Motor Co. v. Parks & Bohne*, 21 Fed. (2d)  
943, 946 (C. C. A. 8).

*Nye Tool & Machine Works v. Crown Die & Tool  
Co.*, 292 Fed. 851, 853 (C. C. A. 7).

**The Similarity or Difference Between the Patented Structure and the Prior Art Is Not to Be Judged by the Names Applied to Such Structure, But by the Much More Fundamental Test of the Work Performed by Each.**

In support of the last stated proposition we cite the following authorities:

*Machine Co. v. Murphy*, 97 U. S. 120.

*Bates v. Coe*, 98 U. S. 31, 42.

“Parts of speech must yield to parts of iron and brass.”

*Beach v. Inman*, 75 Fed. 840, 842.

**The Findings of the Trial Court, Unless Clearly Wrong,  
Should Not Be Disturbed.**

In this case the Master, being the experienced and capable standing Master of the trial court, saw and heard the witnesses and inspected the machines with which this litigation is concerned. Then such Master filed a report of remarkable clarity and soundness. Thereafter the trial judge personally went deeply into the case, reviewed the evidence, and considered the oral and written arguments of counsel. After so doing, the trial judge approved the Master's report, wrote a confirming opinion, and independently made a very complete set of Findings of Fact, followed by Conclusions of Law, which are absolutely conclusive of this case on two grounds, *i. e.*, non-infringement and laches.

With respect to the findings of the trial judge, we submit that:

“His findings, unless clearly wrong, should not be disturbed. *Adamson v. Gilliland*, 242 U. S. 350, 353, 37 S. Ct. 169, 61 L. Ed. 356; *Diamond Patent Co. v. Webster Bros.*, (C. C. A. 9) 249 F. 155, 158; *Central California Canneries Co. v. Dunkley Co.*, (C. C. A. 9) 247 F. 790, 794. See, also, *Collins v. Finley*, (C. C. A. 9) 65 F. (2d) 625, 626; *Easton v. Brant*, (C. C. A. 9) 19 F. (2d) 857, 859.”

*Reinharts, Inc. v. Caterpillar Tractor Co.*, 85 Fed. (2d) 628, 630 (C. C. A. 9).

Certainly the rule in the case last quoted must apply with even greater force in cases, like the one at bar, where counsel for plaintiff-appellant makes no direct attack, or even no plain attack by indirection, upon any fact findings of the trial judge.



### Laches Is a Complete Bar to This Suit.

In the "STATEMENT OF THE FACTS" appearing at the beginning of this brief, we have set forth at length that portion of the Master's report (Tr. pp. 79-86) which discusses the defense of laches, and in such statement we also set forth certain portions of the trial court's opinion (Tr. pp. 141-142) treating of the same defense.

We now set forth, with our own emphasis, those findings, and that conclusion, of the trial judge which are concerned with the subject of laches. We begin at page 153 of the transcript.

"24. That the patent in suit, Letters Patent No. 1,457,025, issued May 29, 1923 on an application filed March 30, 1922, and that plaintiff's *bill of complaint* herein was exhibited *October 3, 1935*.

25. That as early as *September, 1923*, defendant Clark & Wilson Lumber Company purchased two Ross carriers, both of which have ever since been in constant use; that each of these carriers is a straddle type with load lifting means mounted in the frame between the wheels, the lift having four lifting points that work positively and in unison; that each carrier is equipped with a manually operated clutch which can be placed in neutral and which can be operated to move the lift in either direction; that each carrier has means which, when the lift has reached a predetermined point in upward or downward movement, moves the clutch into neutral position and applies a brake to the load lifting means.

26. That the device alleged to infringe claim 4 of the patent in suit was first designed and constructed by the Willamette Iron & Steel Company in *September, 1926*; that the defendant Willamette-Hyster Company succeeded to the carrier business of the former in 1929; and that both companies, during their respective periods of operation, continuously manufactured and sold the alleged infringing device.

27. That the gross amount of defendant Willamette-Hyster Company's sales of the alleged infringing carrier is approximately \$2,000,000.00.



28. That the market for straddle type carriers is largely confined to saw mills and lumber yards; *that the competitive field is largely occupied by Ross, defendant Willamette-Hyster Company, and plaintiff*; that the competition between them is and has been keen; that at least as early as December, 1925, the Ross company advertised its carriers in the trade journals; that the machines of the defendant Willamette-Hyster Company and its predecessor, Willamette Iron & Steel Company, have been advertised in trade journals and in public use since September, 1926; that when in use these carriers travel through lumber yards and over loading platforms, and often upon the public highways; *that in each type of machine the automatic stops are in plain view and the automatic brake is likewise visible to casual inspections by anyone having occasion to visit the mill plant*; that under such circumstances each competing manufacturer must have attained accurate and complete knowledge of the structure employed by the others; that the circumstances were such as to put the plaintiff upon inquiry; *that if plaintiff was in fact ignorant of the alleged infringement, it failed to use reasonable diligence to inform itself of all of the facts*; that there is imputed to the plaintiff accurate and complete knowledge of the structural details of the alleged infringing devices, and an awareness that said alleged infringing devices embodied and/or employed the alleged invention broadly defined by the terms of claim 4 of Letters Patent No. 1,457,025.

29. That plaintiff has failed to sustain the burden of disclosing any impediment to earlier action or of showing how it could have remained ignorant of its rights for so long a period of time, or of showing that it was ignorant of the alleged infringement. *It is found, therefore, that plaintiff had knowledge of the alleged infringement of defendants for more than six (6) years prior to the bringing of this suit.*"

"30. That if defendant Clark & Wilson Lumber Company had knowledge of said Gerlinger patent No. 1,457,025, its knowledge was constructive only; that defendant Willamette-Hyster Company had knowledge of said Gerlinger patent.

31. *That by its failure to give notice of infringe-*

*ment and failure to act*, plaintiff has permitted defendant Clark & Wilson Lumber Company to expend large sums of money in the purchase of allegedly infringing machines and to use said machines *constantly without objection during a period commencing over twelve (12) years prior to the bringing of this suit.*

32. *That by its failure to give notice of infringement and failure to act*, plaintiff has permitted defendant Willamette-Hyster Company (and its predecessor in interest, Willamette Iron & Steel Company) to invest large sums of money in the development, manufacture, and distribution of its carriers, making no objection for approximately *nine (9) years prior to the commencement of this suit.*

33. *That even if infringement existed as alleged, plaintiff is guilty of laches* with relation to each of the defendants.” (Findings of Fact, Tr. pp. 153-156.)

“11. That the plaintiff Dallas Machine & Locomotive Works, Inc., is guilty of laches for its long neglect to assert any right against these defendants and is barred from any recovery in this suit.” (Conclusions of Law, Tr. p. 159.)

As the trial court said:

“While the case of *Gillons, et al. v. Shell Co. of California*, 86 F. 2d, 600, may have distinguishing features, *the principle is applicable here.*” (Opinion of Trial Judge, Tr. p. 142.)

We, for defendants-appellees, respectively submit that the principles announced by this Ninth Circuit Court of Appeals in the Gillons case, are controlling with respect to the case at bar.

In the Gillons case your Honors said:

“At the outset, it will be helpful that we place our inquiry into its proper setting. It must be borne in mind that the decision of the trial court on the subject of laches will not be set aside unless it is palpably wrong.

In *The Kermit*, 76 F. (2d) 363, 367, certiorari denied, *Lamborn v. American Ship & Commerce Nav. Co.*, 296 U. S. 581, 582, 56 S. Ct. 93, 80 L. Ed. 411, we said: ‘As the decisions indicate, the question of laches is ad-

dressed to the sound discretion of the trial judge, and his decision will not be disturbed on appeal unless it is so clearly wrong as to amount to an abuse of discretion.' '' (p. 604.)

In the case at bar the findings and conclusions of the trial court are not palpably wrong. They are correct and just. In the case at bar the trial judge has not been guilty of an *abuse of judicial discretion*. The trial judge, at all times, was most solicitous of the rights of appellant,—deciding the case against appellant, on the laches issue, only because compelled to do so by the proven facts and the law of this circuit applicable to such facts. Moreover, and as pointed out at earlier points in this brief, plaintiff-appellant has not made any direct attack, or any very plain attack by indirection, upon any of the Findings of Fact made by the trial judge,—although, of course, appellant does not relish the Conclusions, logically and necessarily following such fact findings, which required the dismissal of this suit.

And in the Gillons case this court said:

“When the suit is filed *after* the statutory period, injury is presumed. In *McGrath v. Panama R. Co.* (C. C. A. 5) 298 F. 303, 304, the court said: ‘The appellant suggests that no injury is shown to have been done to the appellee by the delay in filing the libel. Injury is presumed from the statutory period of limitations in common-law actions, and, when equity adopts the statutory period, it adopts along with it the presumption of injury, until the contrary is shown.’ See, also, *Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.* (C. C. A. 9) 73 F. (2d) 200, 203.

In the patent cases, the ‘analogous’ statutory period is six years.” (Citing cases.) (p. 608.)

In the case at bar appellee Clark & Wilson Lumber Company continuously was using machines of the character said to be covered by the claim in suit for over *twelve years* prior to the filing of the bill of complaint (Finding 31, Tr. p. 156), and appellee Willamette-Hyster Company,



and its predecessor, were investing money for, and were making and distributing, machines of the character said to be covered by the claim in suit, for a period of over *nine years* prior to the commencement of this suit.

And in the Gillons case, this court also said:

“It is precisely because equity recognizes this *frailty of human memory* that she has launched her canon against unreasonable delay in bringing suit. Gillons is not to be penalized for his faulty recollection. He is, however, responsible for having stood idly by for so long a period that he can no longer recapture the misty memories of another day—memories that have, perhaps, vanished as completely as the snows of yesteryear.” (p. 609)

In the case at bar Mr. Gerlinger, President of the appellant company, avoided much interrogation, as to matters directly relating to the defense of laches, by averring poor memory on account of lapse of time.

For example:

“Q. Who was it that reported the fact to you a year or two after Clark & Wilson bought your hydraulic carriers that they were using Ross carriers at their plant?

A. *I couldn't say that.*

\* \* \* \* \*

Q. Is it your testimony that no one ever reported to you anything concerning the construction and operation of the Ross carriers in use by the defendant Clark & Wilson Lumber Company at or after the time that you sold Clark & Wilson your hydraulic carriers?

A. Oh, I wouldn't say that, *but I don't remember.*

Q. As a matter of fact, Mr. G. A. Grab, who was then working for you, called your attention to the fact that Clark & Wilson were using Ross carriers, didn't he?

A. That might be true, but *I don't remember he did.*” (Tr. pp. 427, 428.)

The case at bar is just another one of those cases, characterized by long and unreasonable delay in bringing suit,



where the plaintiff chose not to remember, or may have forgotten, facts which at the time of trial were inimicable to the maintenance of the action.

In general with respect to the defense of laches, and disregarding the specific facts of the case then under decision, your Honors, in the Gillons case, said:

“To sustain the lower court’s findings of laches in the instant case, however, it is not necessary to rely upon the foregoing special considerations, or upon estoppel, or even upon the ‘analogous’ statute of limitations. There is another and all-embracing principle that amply justifies the District Judge’s exercise of discretion.

*Equity frowns upon stale demands.* She will not aid one who has slept upon his rights. She turns her back upon a litigant who has been guilty of unreasonable delay in filing suit.

In a line of decisions extending farther back than a century, our Supreme Court has recognized this equitable doctrine, as being grounded upon considerations of ‘the peace of society’ and of ‘public convenience.’ In *Piatt v. Vattier*, 9 Pet. 405, 416, 417, 9 L. Ed. 173, Mr. Justice Story said: ‘The established doctrine, or, as Lorde Redesdale phrased it, in *Hovenden v. Annesley*, 2 Sch. & Lef. 637-8, ‘the law of courts of equity,’ from its being a rule adopted by those courts, independent of any positive legislative limitations, is, that it will not entertain stale demands. Lord Camden, in *Smith v. Clay*, 3 Bro. C. C. 640, note, stated it in a very pointed manner. ‘A court of equity,’ said he, ‘which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, or acquiesced for a great length of time. *Nothing can call forth this court into activity, but conscience, good faith and reasonable diligence.* Where these are wanting, the court is passive and does nothing; laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation of suits in this court.’

Again in *Wagner v. Baird*, 7 How. 234, 258, 12 L. Ed. 681, the court said:

'But there is a defence peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitations directly governs the case. In such cases courts of equity often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights, or long acquiescence in the assertion of adverse rights. (2 Story Eq. 1520.)

'A court of equity will not give relief against conscience or public convenience where a party has slept upon his rights.'

See, also, *McLean v. Fleming*, *supra*, (citing long list of cases) \* \* \*

"In connection with the bar of laches, from the earliest days federal courts have emphasized the distinction between a reasonable and an unreasonable delay in bringing suit—even *within* the period designated by the statute of limitations.

In *Patterson v. Hewitt*, *supra*, 195 U. S. 309, at page 318, 25 S. Ct. 35, 37, 49 L. Ed. 214, Mr. Justice Brown used the following language: 'But where the statute is in terms applicable to suits in equity, as well as at law, it is ordinarily construed, in cases demanding equitable relief, as fixing a time beyond which the suit will not, under any circumstances, lie; but not as precluding the defense of laches, provided there has been unreasonable delay within the time limited by the statute. In an action at law, courts are bound by the liberalism of the statute; but in equity the question of unreasonable delay within the statutory limitation is still open. (Cases cited.)

In *Prince's Metallic Paint Co. v. Prince Manuf'g. Co.* (C. C. A. 3), 57 F. 938, 944, the court said: 'In courts of equity the rule is to withhold relief where there has been unreasonable delay in prosecuting a claim, or long acquiescence in the assertion of adverse rights. (Cases cited.) Again and again has it been judicially declared that nothing can call into activity a court of equity but 'conscience, good faith, and reasonable diligence.' (Cases cited.) In *McLaughlin v. Railway Co.* (C. C.), 21 F. 574, Judge Brewer held a bill for the infringement of a patent, alleging the unauthorized use and construction of a patented invention

for 13 years, without stating an excuse for the plaintiff's delay in suing, to be demurrable. Laches for even less than the statutory period of limitations, aided by other circumstances, will bar a right. (Case cited.)'

In *Miles v. Vivian* (C. C. A. 2), 79 F. 848, 853, the court said: 'Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights unreasonably long, and shows no excuse for having done so.'

And in more recent days, in the case of *Window Glass Mach. Co. v. Pittsburgh Plate Glass Co.* (C. C. A. 3), 284 F. 645, 650, certiorari denied, 261 U. S. 623, 43 S. Ct. 518, 67 L. Ed. 832, the following language was used:

'The circumstances were such, without repeating them at length, that the plaintiffs knew or were chargeable with knowledge of the practices and the apparatus employed by the defendant at its several works during these periods. (Cases cited.) On these facts and circumstances the defendant makes the defense of laches.

'This defense is based on a well-settled principle of law. In its application courts recognize the general rule that, in a case of this kind, mere delay, unaccompanied by anything else, will not ordinarily bar a suit for injunction against a naked infringer. (Cases cited.) But they also recognize a distinction between *mere delay* and *unreasonable delay*, where in the latter is involved the element of lack of diligence and the consequent inequity, under the circumstances, of permitting the *claim* to be enforced.''' (Italics our own) (pp. 609, 610.)

Surely, upon the basis of the facts presented in the case at bar, and in view of the principles laid down in the Gillons case, the court below was justified in holding—had no choice other than to hold—that laches is “a complete bar” to this suit.



## Laches Is a Bar to Both Injunctive and Compensatory Relief.

We believe that the principles stated in the *Gillons* case, *supra*, and the application of such principles in that case, are ample authority for the proposition that gross laches, of the kind presented in the case at bar, will preclude both injunctive and compensatory relief. However, we shall now cite other cases in support of such proposition, quoting short excerpts from some of them.

“During all of the time from 1920 to the date of the filing of the bill of complaint the defendant was openly, not secretly, engaged in manufacturing what is now claimed is an infringement, without any action being taken on the part of the owner of the patent, even the giving of notice, until shortly before the commencement of this action.

“Laches of this character is such as will *prevent a court of equity from entertaining the bill.*”

*Cinema Patents Co. v. Duplex Motion Picture Industries*, 60 Fed. (2d) 1013, 1019 (D. C., E. D. N. Y., Feb. 2, 1932—Campbell, D. J.).

“This is not a defense of estoppel, but of *laches*, and it would be inequitable to now hold the defendant, but a short time before the patents expire, who bought this machine almost seven years after it was put into open, public, not secret, use during which time no suit for infringement had been commenced, and openly used the machine for over five years after such purchase before any suit was commenced.

“While it may be that knowledge has not been established sufficient to warrant the application of the doctrine of estoppel, it seems clear to me that, on the evidence before this court, the doctrine of laches applies. *Triplex Safety Glass Co. v. Kolb*, 53 F. (2d) 1062, opinion of Kirkpatrick, J., D. C., E. D. Pa., June term, 1931.

“Certainly the owners of these patents have slept on their rights, and I believe there has been acquiescence in the alleged infringement. If the owners of



the patents had proceeded diligently to protect their rights, it is hard to believe defendant would have purchased the machine, *and the court should not entertain this complaint.* *Kittle v. Hall* (C. C.), 29 F. 508, 511."

*Cinema Patents Co. v. Warner Brothers Pictures*,  
55 Fed. (2d) 948, 959, 960 (D. C., E. D. N. Y.,  
Fed. 2, 1932—Campbell, D. J.)

"A concise and generally accepted definition meeting with favor is worded thus: 'Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another.' *Chase v. Chase*, 20 R. I. 202, 37 A. 804."

\* \* \* \* \*

"We think, therefore, that there is justification in patent suits for withholding damages for infringements committed prior to the commencement of the suit when laches is established, notwithstanding injunctive relief be granted. But, when it can be shown that the holder of the patent in addition to being guilty of laches has, by his conduct, estopped himself from asserting his rights under the patent, *all relief should be denied and the bill dismissed.*"

*George J. Meyer Mfg. Co. v. Miller Mfg. Co.*, 24  
Fed. (2d) 505, 507, 508 (C. C. A. 7—Feb. 23,  
1928—Evan A. Evans, C. J.).

"As we are of opinion that the decree of the District Court dismissing the bill should be affirmed upon the merits, it is unnecessary that we consider the special defenses pleaded in the answer. *It may not be amiss to observe, however, that the laches shown by the record would be quite sufficient of itself to bar complainant of relief in this case.* \* \* \*"

*Wolf Mineral Process Corp. v. Minerals Separation N. A. Corp.*, 18 Fed. (2d) 483, 490 (C. C. A. 4—April 12, 1927—Parker, C. J.).

"When delay in prosecuting a claim is so unusual as to carry with it the appearance of being unreasonable, as in this case, there develops upon a plaintiff the burden of disclosing the impediments to an earlier

action; of showing, if ignorant of his rights, how he had remained in ignorance so long; and of revealing how and when he first came to a knowledge of the matters on which he relies in his bill for relief.  
\* \* \*,

\* \* \* \*

“Feeling that the plaintiffs have not sustained the burden which the law placed upon them on the issue of laches, *we affirm that part of the decree by which the trial court dismissed the bill as to the Lubbers patents Nos. 702,013, 702,014 and 702,015.*”

*Window Glass Mach. Co. v. Pittsburgh Plate Glass Co.*, 284 Fed. 645 (C. C. A. 3).

“\* \* \* The complainant and the patentee, who has an interest in this litigation, are guilty of laches, *and have thereby lost any right they might have had against the defendant.* This point alone is dispositive of the case and justifies denial of the relief sought.”

*Yates v. Smith*, 271 Fed. 27, 32, 33 (D. C., D. N. J., May 15, 1920—Davis, D. J.).

“I am of opinion that equity as applied to modern business developments requires that, in this particular case, injunctive relief in any event be denied.  
\* \* \*,

\* \* \* \*

“That complainant, in any event, would not be entitled to an accounting, is clear under the authority of *Menendez v. Holt*, *supra*, and *Mosler v. Lurie*, and for the reasons outlined I am also satisfied *complainant is not entitled to prevail on any theory.*”

*Valvoline Oil Co. v. Havoline Oil Co.*, 211 Fed. 189, 195 (D. C., S. D. N. Y., Dec. 23, 1913—Mayer, D. J.).

“\* \* \* This lapse of time not only constitutes a bar, such as the statute of limitations interposes, but shows such *laches as will clearly preclude any right to relief.* \* \* \*,

*Cummings v. Wilson & Willard Mfg. Co., et al.*, 4 Fed. (2d) 453, 455 (C. C. A. 9—Jan. 26, 1925—Ross, C. J.).

“The question of laches then assumes the aspect of the plaintiff having stood by and having done nothing to protect its rights for seven years while the defendant was building up a business, which it thought was legitimate, and spending money in constructing a large plant.”

\* \* \* \*

“We think that the evidence clearly shows the delay, during which the defendant materially changed its position, to be inexcusable. *Consequently, we cannot say that the District Judge erred in refusing an injunction and an accounting.*”

*Westco-Chippewa Pump Co. v. Delaware Electric & S. Co.*, 64 Fed. (2d) 185, 186, 187, 188 (C. C. A. 3—March 17, 1933—Davis, C. J.).

See, also:

*Dwight & Lloyd Sintering Co. v. Greenawalt*, 27 Fed. (2d) 823, 826, 827 (C. C. A. 2—August 20, 1938—L. Hand, C. J.).

*Universal Arch Co. v. American Arch Co.*, 290 Fed. 647, 653 (C. C. A. 7—Sept. 28, 1922—Rehearing denied May 8, 1923—*Per Curiam*).

*Woodmanse & Hewitt Manufacturing Co. v. Williams*, 68 Fed. 489, 491, 492 (C. C. A. 6—June 4, 1895—Lurton, C. J.).

**Mere Delay Unaccompanied by Any Change of Position by Defendant in Reliance Upon Plaintiff's Conduct Is Sufficient to Justify Dismissal of the Bill of Complaint.**

Cases other than *Gillons*, *supra*, supporting the proposition last stated, are as follows:

*Window Glass Mach. Co. v. Pittsburgh Plate Glass Co.*, 284 Fed. 645, 659 (C. C. A. 3). *Certiorari* denied 261 U. S. 623.

*Wilkie v. Manhattan Rubber Mfg. Co.*, 8 Fed. (2d) 785, 788. Affirmed 14 Fed. (2d) 811 (C. C. A. 3).

*Cinema Patents Co., Inc. v. Duplex Motion Picture Industries, Inc.*, 60 Fed. (2d) 1013, 1018, 1019. Affirmed 66 Fed. (2d) 748 (C. C. A. 2).

*Hall v. Frank*, 195 Fed. 946.

*Thacher v. Board of Supervisors of Polk County, Iowa*, 235 Fed. 724, 727, 728.

*Wolf Minerals Process Corp. v. Minerals Sep. North American Corp.*, 18 Fed. (2d) 483, 490 (C. C. A. 4).

*Meyer Mfg. Co. v. Miller Mfg. Co.*, 24 Fed. (2d) 505, 506, 507, 508 (C. C. A. 7).

*Dwight & Lloyd Sintering Co., Inc. v. Greenawalt*, 27 Fed. (2d) 823, 827 (C. C. A. 2).

**Alleged Lack of Knowledge of the Acts Complained of Does Not Excuse Laches When Reasonable Diligence Would Have Provided Such Knowledge.**

Additional authorities supporting the proposition last stated are as follows:

*Foster v. Mansfield*, 13 Sup. Ct. 28, 32, 33.

*Johnston v. Standard Min. Co.*, 13 Sup. Ct. 585, 589.

*Woodmanse & Hewitt Mfg. Co. v. Williams, et al.*, 68 Fed. 489, 491, 492, 493 (C. C. A. 6).

*Window Glass Mach. Co. v. Pittsburgh Plate Glass Co.*, 46 Fed. (2d) 484, 489. Affirmed 284 Fed. 645 (C. C. A. 3).

*Safety Car Heating & Lighting Co. v. Consolidated Car Heating Co.*, 160 Fed. 476, 493, 494. Affirmed 174 Fed. 658 (C. C. A. 2).

*Brown & Sharpe Mfg. Co. v. Coates Clipper Mfg. Co.*, 195 Fed. 84, 87.

*A. R. Mosler & Co. v. Lurie*, 209 Fed. 364, 370, 371 (C. C. A. 2).



**The Claim in Suit Attempts to Cover an Exhausted Combination and, Therefore, Is Void Under the Doctrine Recently Stated and Re-Stated by the Supreme Court in *Bassick v. Hollingshead* and *Lincoln v. Stewart Warner*.**

In *Bassick v. Hollingshead*, 89 L. ed. 1251, 298 U. S. 415 (1936) the Supreme Court condemned claims for exhausted combinations. The court, at page 425, said:

“The question then is whether, by this method, the patentee, by improving *one element* of an *old combination* whose construction and operation are otherwise unchanged, may, in effect, *repatent* the old combination by *reclaiming it* with the improved element substituted for the old element. That this cannot be done is shown by numerous cases in this and other federal courts.”

Specifically this meant that the *combination* of a grease cup and a grease pump being old, the exhausted combination between the cup and the gun could not validly be repatented by one who had made some specific improvement in one or the other of the old elements of the exhausted combination.

This rule seemingly did violence to what many patent lawyers (and courts) thought was proper claim drafting,—and it was necessary for the Supreme Court to restate and amplify the rule.

So in *Lincoln v. Stewart Warner*, 82 L. Ed. 1008, 303 U. S. 544 (1938), we find the Supreme Court saying:

“As the Circuit Court of Appeals held, a headed nipple or fitting connected with the bearing, and to be coupled to the conduit from the grease gun, is old and unpatentable. A compressor or pump for propelling lubricant is old and unpatentable as such. *The invention, if any, which Butler made was an improvement in what he styles in his specifications the ‘chuck’ and in his claim a ‘coupling member.’* It is not denied that multi-jawed chucks had been used in industry and as couplers in lubricating apparatus. Butler may have devised a patentable improvement in

such a chuck in the respect that the multiple jaws in his device are closed over the nipple by the pressure of the grease, but we think he did no more than this. As we said of Gullborg in the Rogers Case, having hit upon this improvement he did not patent it as such but attempted to claim it in combination with *other old elements which performed no new function in his claimed combination*. The patent is therefore void as claiming more than the applicant invented. The *mere aggregation* of a number of old parts or elements which, in the *aggregation*, perform or produce no new or different function or operation than that theretofore performed or produced by them, *is not patentable invention*. And the improvement of one part of an old combination gives no right to claim that improvement in combination with other old parts *which perform no new function in the combination*.

\* \* \* \* \*

We conclude that Butler's effort, by the use of a combination claim, to extend the monopoly of his invention of an improved form of chuck or coupler to old parts or elements having no new function when operated in connection with the coupler renders the claim void."

So squarely does the last quoted language of the Supreme Court fit Gerlinger's claim in the case at bar, that it may be paraphrased as follows:

As *the trial judge held, an elevator mounted on a truck, and to be included in driven relation to the truck power plant, is old and unpatentable. A truck—yea a straddle truck—for carrying an elevator is old and unpatentable as such. The invention, if any, which Gerlinger made was an improvement in what he styles in his specifications the "lifting device."* It is not denied that *lifting devices* had been used in industry and as *elevators in lumber carriers*. *Gerlinger* may have devised a patentable improvement in such a *lifting device* in the respect that *it comprises a load actuated stop member 67*, but we think he did no more than this. As we said of Gullborg in the Rogers (Hollingshead) Case, having hit upon this improvement he did not patent it as such, but attempted to claim it in combination with other old

elements which performed no new function in his claimed combination. The patent is therefore void as claiming more than the applicant invented. The mere aggregation of a number of old parts or elements which, in the aggregation, perform or produce no new or different function or operation than that theretofore performed or produced by them, is not patentable invention. And the improvement of one part of an old combination gives no right to claim that improvement in combination with other old parts which perform no new function in the combination.

\* \* \* \* \*

We conclude that *Gerlinger's* effort, by the use of a combination claim, to extend the monopoly of his invention of an improved form of *lifting device* to old parts or elements having no new function when operated in connection with the *elevator* renders the claim void. (In this paraphrase the italicized matter is ours.)

Graphically to demonstrate that the Gerlinger claim in suit attempts to cover an exhausted combination, just as did the Butler claim in *Lincoln v. Stewart-Warner*, we present opposite this page a chart whereon the recitals of the invalidated Butler claim are presented in contrast to the recitals of the invalid Gerlinger claim. On ~~each~~<sup>SUCH</sup> chart, the language of each claim is divided between two rectangles,—one of such rectangles containing the words of the claim which are descriptive of the *unimproved* element or component of the exhausted combination, and the other rectangle containing the words of the claim descriptive of the allegedly *improved* element or component of the exhausted combination.

Thus on the chart, Butler's *unimproved* nipple corresponds with Gerlinger's *unimproved* truck; and Butler's allegedly *improved* grease compressor corresponds with Gerlinger's allegedly *improved* elevator.

The combination (or more properly aggregation) of a truck and an elevator carried on the truck was old long



# BUTLER PATENT

(LINCOLN vs. STEWART-WARNER)

## THE EXHAUSTED COMBINATION.

(1) a headed nipple for receiving lubricant,

(2) a lubricant compressor having a coupling member for connecting said compressor and nipple comprising a cylinder, a piston movable within the cylinder, and having an aperture for the discharge of lubricant thereof, an apertured sealing seat carried by said piston for engagement with the end of the nipple, connecting the piston aperture with a passage through the nipple, radially movable locking elements carried by the cylinder coacting with the nipple and actuated by said piston for compressively clutching the elements upon the nipple whereby the pressure of the lubricant on said piston will move the piston to forcibly compress said elements while the lubricant is passing through said connecting parts.

THE UNIMPROVED ELEMENT  
(BUTLER'S NIPPLE)

THE IMPROVED ELEMENT  
(BUTLER'S COMPRESSOR)

# GERLINGER PATENT

(OF THE CASE AT THE BAR)

## THE EXHAUSTED COMBINATION

(1) lumber carrier comprising a frame,

(2) load lifting means mounted therein, means for transmitting motion from a source of power to the load lifting means comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction, means for manually moving the clutch to operative position, automatic means for moving the clutch to neutral position upon a movement of the load lifting means to a predetermined extent in either direction, and means for braking the transmitting means whenever the clutch is moved to neutral position.

THE UNIMPROVED ELEMENT  
(GERLINGER'S TRUCK)

THE IMPROVED ELEMENT  
(GERLINGER'S ELEVATOR)





before the application for the Gerlinger patent in suit. See Ross patent No. 1,209,209 (Ex. Bk. p. 1203); Ross patent No. 1,271,947 (Ex. Bk. p. 816); and Overlin patent No. 1,323,719 (Ex. Bk. p. 1080). See even Gerlinger's *expired* patent No. 1,422,958 (Ex. Bk. p. 805). So it appears, incontrovertibly, that the aggregation of a truck and an elevator carried by that truck was very old and well known at the time Mr. Gerlinger made the alleged invention of the patent in suit. Such *patentable combination*, if any, which there once was between the truck and elevator, was *exhausted*.

Let us see what the trial judge has said about the truck and elevator aggregation—that long exhausted combination to which Gerlinger directed the claim in suit. The judge found:

“6. That the field in which the Gerlinger invention was developed is divided into two parts, namely, that relating to *elevators* or lifting devices, and that relating to self-propelled *vehicles* or carrying devices; that except as they are disposed on or within the same frame they are entirely independent and the essential function of each respective mechanism remains unchanged; \* \* \*” (Findings of Fact, Tr. p. 147.)

And let us not forget that Gerlinger's alleged invention was concerned only with improvement of the *elevator* element or component of the aggregation. On this point the trial judge, in his opinion, said:

“The validity of the Gerlinger patent should be first then considered in relation to the construction of *elevators*, because the essential elements of the claim in question relate to the operation of a lifting device. Every element in this device was old in that art except the member 67, which stopped the operation of the elevator by the upward pressure of the load.” (Tr. p. 133.)

Thus undubitably it appears that elevators were old; that

trucks were old; and that the aggregation of a truck and an elevator, the latter being carried by the former, was old. Mr. Gerlinger came along and allegedly improved the *elevator* element or component of the old aggregation. He made absolutely no improvement in the old straddle truck by which the allegedly new elevator was carried.

But is Mr. Gerlinger's claim 4 in suit limited to the elevator? No! Instead of claiming the elevator, which was the only thing which he improved or changed, he *reclaims* the exhausted combination of truck-and-elevator. He does this despite the fact that his allegedly improved elevator bears no relation to the truck which is in any way different from the relations borne to their respective trucks by the elevators of the straddle trucks and lift trucks of the prior art.

Consequently, we can say of the Gerlinger patent what the Supreme Court said of the Butler patent, viz.:

“The patent is therefore void as claiming more than the applicant invented.”

### **Some Additional Observations Concerning Appellant's Brief.**

#### **I.**

Appellant's brief is replete with suggestions that an important feature of the alleged invention of the patent in suit is “rack-and-pinion mechanism” included in or associated with the load lifting means. For example, see page 4 of the brief. Appellant's counsel seems to believe that the term “rack-and-pinion mechanism” should be broadened into “positively acting mechanism” and then that such broader term should be read into the claim in suit in lieu of (for example) the limitation to the load actuated stop

which the trial court read into the claim (as being Gerlinger's only novel contribution).

Such "rack-and-pinion mechanism" is disclosed in Mr. Gerlinger's expired patent No. 1,422,958. (Ex. Bk. p. 805.) During the prosecution of the application for that patent the Examiner held, and Gerlinger agreed, that there was no invention in using rack-and-pinion mechanism in connection with the load lifting means of the straddle truck disclosed in such application. For the Examiner's holding see Ex. Bk. p. 877. Gerlinger's acquiescence was indicated by the cancellation of claim 1 (original claim 3) which claimed the use of rack bars, and necessarily their cooperating pinions, in the load lifting mechanism. (For amendment cancelling such claim see Ex. Bk. p. 879. For original claim 3 see Ex. Bk. p. 867.)

## II.

The drawing appearing between pages 3 and 4 does not correspond with any exhibit.

## III.

The drawing appearing between pages 9 and 10 does not represent the carrier of the patent in suit. Such drawing contains the stop members 90 and 91 which the patent does not disclose.

## IV.

On the chart opposite page 15 the witness Grab is misquoted. On this same chart the quotation from the opinion of the trial court is incomplete and, therefore, misleading.



## V.

No attempt is made to distinguish the facts in this case (*re laches*) from the controlling case of *Gillons v. Shell Co. of California*. Appellant's counsel attempts blithely to waive aside that pertinent and controlling case by inferring that it is one

“presenting an entirely opposite state of facts than existing in the instant case.” (Brief p. 69.)

**Conclusion.**

Appellees submit:

1. That there should be a summary affirmance of the lower court decree because appellant has not shown, or attempted to show, error in those Findings of Fact of the trial judge which are absolutely conclusive of this case as to at least two defenses, *i. e.*, non-infringement and laches.

2. That the single claim in suit is readable in terms, and in spirit, upon each of several patented machines of the prior art, and is therefore invalid unless limited and restricted to the specific device which is exhibited by the patent in suit,—*i. e.*, unless restricted, *inter alia*, to the load actuated stop 67 which, the trial judge held, was Gerlinger's only novel contribution to the art.

3. That the claim in suit, when limited as it must be limited to save it from invalidity, is not infringed by appellees' accused machine.

4. That appellant has been guilty of laches so gross as to bar to any and all relief demanded by the Bill of Complaint.

5. That the claim in suit represents an attempt to re-patent an exhausted combination and is therefore void under the doctrine of the Supreme Court stated in *Bassick*

v. *Hollingshead* (*supra*) and *Lincoln v. Stewart-Warner* (*supra*).

6. That the decree of the trial court should be affirmed.

Respectfully submitted,

ALBERT G. McCALEB,

AUSTIN F. FLEGEL, JR.,

*For Defendants-Appellees.*



No. 9342

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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DALLAS MACHINE & LOCOMOTIVE  
WORKS, INC., a corporation,

Appellant,

vs.

WILLAMETTE - HYSTER COMPANY, a corporation, and CLARK & WILSON LUMBER  
COMPANY, a corporation,

Appellees.

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Appellant's Reply Brief

THEODORE J. GEISLER,

*Attorney for Appellant.*

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PAUL P. O'BRIEN,  
CLERK





## AUTHORITIES REFERRED TO HEREIN

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Appellees.

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Appellant's Reply Brief

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From page 2 of Appellant's Brief, it is apparent that only three questions are presented by this Appeal. These arose on the defenses interposed to the Complaint, viz:

I. "That the invention was anticipated by prior art and the patent claim sued on is invalid; II. That in order to sustain the claim, at all, it must be narrowed by



construction, and when so construed, the defendants do not infringe; III. That the plaintiff's delay in instituting suit on this patent shows it to have been guilty of such laches that it must be barred from all relief."

The introduction of the Brief further states that:

"The trial of the case was referred by the Court to the Standing Master who reported in favor of defendants on all three defenses; and the District Court confirmed the Master's report overruling plaintiff's exceptions.

"Appellant's contention is that the proofs refute all of the defenses."

No conflict of evidence is involved. The only questions to be determined by this Court are the sufficiency of the evidence to support the Findings of Fact and the Conclusions of Law of the District Court as provided by Rule 52 of the Federal Rules of Civil Procedure.

Appellant in the preparation of its Brief endeavored to comply faithfully with the rules of this Court and in compliance with the purpose thereof did endeavor to specify with particularity the Findings of Fact and Conclusions of Law complained of by Appellant as erroneous. In accordance with the Rule 19, 6, Appellant "upon the filing of the record in this Court" filed with the Clerk "a concise statement of the points on which Appellant intends to rely on this Appeal." This required statement of Points on Appeal, Appellant's Counsel believes to be a substitute for the former "Assignment of Errors", in conformity with the procedure prescribed by Rule 75 of the Federal Rules of Civil Procedure, and Appellant's counsel interpreted the re-

quirement of Rule 20, 2(d) of this Court, as to the specification by Appellant “as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous”, as requiring a reference in the Brief to said Points on Appeal on which Appellant relies. And so, at the end of the statement of the facts concerning specifically each of the three points of Appeal, Appellant stated its exceptions to the Finding of the Master; and at the head of the Argument on each of these three Points entitled—I. “Claim 4 of Plaintiff’s patent is Valid”, p. 42; II. “The Appellees Infringed the Plaintiff’s patent”, p. 60; and III. “The Defense of Laches and Estoppel is Without Basis”, p. 61-73, and Appellant referred specifically to said Points on Appeal.

If Appellant’s counsel has misconstrued the requirement of Rule 20, 2(d) as Appellees’ counsel contends, Appellant begs the indulgence of the Court. It is submitted that Appellant’s Brief shows that Appellant endeavored in good faith to point out, fully and concisely the three questions to be considered and decided by this Court. And it is further submitted, that Appellees’ Brief shows that Appellees understood fully the questions presented by this Appeal.

\* \* \* \*

The Appellees’ Brief, by side-stepping the dominant points squarely presented by Appellant’s Brief, and by making unwarranted deductions from the evidence in this case, confuses instead of aiding the Court in the consideration and determination of the simple questions presented by this Appeal.

The first question is, "Is Claim 4 valid?" Its validity is stated by Appellant's Brief beginning at page 42. It is based on the following facts:

The cable-operated mechanism for lifting and lowering the load-carrying shoes of the prior straddle-type carriers was undependable. "The cable did not give a positive and uniform" action. (Master's Report, Tr. 59). The District Court said, (Tr. 140): "It is true that the other 'straddle carriers' had ropes or cable lifts and were probably not as efficient as the Gerlinger device."

The Master credited Gerlinger with the origination of "load-lifting means \* \* \* having *four lifting points that lift positively and in unison.*" (Master's Report, Tr. 76.)

The District Court said: "The Gerlinger device does contain a four-point independent lift positively actuated". (Tr. 134).

Appellees in asserting invalidity of Claim 4 apparently rely on the Findings of the Master and their adoption by the District Court. But Appellant challenges these findings on the ground that they are contrary to the evidence.

Neither the Master nor the District Court found the combination of Claim 4 anticipated by prior *existing* devices, but built up the anticipation by a purely imagined prior similar combination. According to the conjecture



of the Master the prior, undependable straddle-type carrier was, in the first place, to be *reconstructed* by doing away with the undependable cable-operated mechanism and substituting in its place a four-point *positive* and *uniformly-actuated* mechanism; and then, in connection with such imagined *reconstruction*, to provide further means for limiting the raising and the lowering of the load-carrying shoes to safe levels. For such imagined *reconstruction* the art waited for seven years; until Gerlinger gave it to the art; and his improvement was thereupon immediately adopted. (Appellant's Brief, page 48). Evidently the fault of the prior cable mechanism went unobserved; or, a means for overcoming the fault was not conceived by prior inventors, or users, or manufacturers.

Appellees, unable to prove anticipation, have recourse to the theory of alleged aggregation. Appellees do not pretend to support this theory, but again rely on the Master's findings. Appellees, in their Brief, beginning on page 27, do refer to the several *single-point platform lift trucks*, (also called "front-end" trucks) shown by the patents to Dingee, Carr, and other similar trucks, or stationary elevators, as examples of mechanism for controlling the raising and lowering of the platform. All these patents, as Appellees' own expert witness, Grab, said, were alike in principle of operation, and *did not suggest* the building of a straddle-type carrier. (See Appellant's Brief, page 16).

Appellees, realizing the utter insufficiency of their proofs of anticipation, make much ado of the fact that Appellant at the trial of this case disclaimed the front-



end truck shown by Defendants' Exhs. 41, 42, and 43 (Tr. 945, 948 and 949) as an infringement of the patent. (See Tr., page 443). The Appellees seek to distort such disclaimer of infringement to an admission of the invalidity of Claim 4, in support of the findings of the Master. The reason for said disclaimer is simple. Exh. 41 is the same type of platform-truck as shown by said patents to Dingee, Carr, and others referred to in Appellants Brief, page 15. None of these platform trucks obviously would infringe Claim 4, had they been later than the patent in suit. Not infringing Claim 4 they cannot constitute an anticipation of the claim.

Anticipation of Claim 4 is attempted by Appellees by imaginative combination to be obtained by the interpretation of prior patents, (viz: the patents on straddle-type carriers of Ross and Overlin), showing undependable cable-operated mechanism, and not requiring, therefore not showing, any control for the lifting and lowering of the load, except the manual control of the motor applied by the driver of the carrier. These Ross and Overlin patents are to be *reconstructed* by substituting for their cable mechanism a positive and uniformly-actuated mechanism; and the anticipating device so partly imagined is to be completed by tying in with it means for limiting the lifting and lowering of the load, these means to be taken from the patents to Dingee, Carr, and others describing platform-trucks and elevators; with the control shown by these patents rearranged so as to be adapted for being combined with positive and uniformly-actuated lifting and lowering mechanism.

On this point, the holding of this Court in the case of *J. A. Mohr & Son vs. Alliance Securities Co.*, 14 Fed. (2d) 799-800 is to be applied. This Court said:

“It will not do to say that the Fisher combination might by a slight modification be made to perform the same functions. It is to be borne in mind that *the prior art here relied upon consists entirely of patents, and that when it is sought by means of prior patents to ascertain the state of the art, ‘nothing can be used except what is disclosed on the face of those patents. They cannot be reconstructed in the light of the invention in suit, and then used as a part of the prior art.’* *Naylor v. Alsop Process Co.*, 168 F. 911, 94 C. C. A. 315; *Frey v. Marvel Auto Supply Co.*, 236 F. 916, 150 C. C. A. 178. *And the presumption that a patented combination is new and useful and embodies invention has added force where, as here, it appears that the patents relied upon as showing anticipation were considered by expert Patent Office officials. While their judgment is not absolutely binding on a court, it is entitled to great weight and is to be overcome ONLY by clear proof that they were mistaken and that the combination lacks patentable novelty.”*

The principle announced by this Court in the case last referred to has been adopted and cited with approval in many later decisions; for example, *Gulf Smokeless Coal Co. vs. Sutton, Steele & Steele*, 35 Fed. (2d) 433, 437 (C. C. A. 4th).

Since the evidence leaves Claim 4 unscathed, the Appellees persistently drag in the load-actuated stop No. 67, merely described in the specification of the patent

in suit as an incidental feature, in a futile attempt to confuse the issues in this case. Neither the Master (see his Report, Tr. 63) nor the District Court (see Tr. 141) found anything to criticize in the employment by Gerlinger, in the control mechanism of his lifting means, of a stop mechanism operating in response to the mere lifting of the shoes and constructed in the same way as the stop mechanism employed controlling the lowering of the shoes. The Master, in his report (Page 75) indeed conceded that "The plaintiff herein does not limit the scope of his patent to a *specific* means whereby the clutch is thrown into neutral and the brake simultaneously applied." But the Master, finding it impossible to conceive invention according to his estimate of what Gerlinger did to make the undependable straddle-type carriers efficient, held that Gerlinger's invention was "not primary and cannot be accorded the broad construction." Therefore he purposed saving claim 4 by restricting the broad term "*means*" to "*load-actuated*" means. The combination of Claim 4 being broadly new, the District Court was without authority to change its language and thus, in effect, nullify it.

The rack bars and pinions employed by Gerlinger and specifically described in his patent specifications, were correctly described by the Master, (Tr. page 69) as "a mechanism of a positive or rigid type such as rack bars and pinions, toggle lifts or screw type." The Appellees' infringing straddle-type carriers employed mechanism of the screw type as shown by Exh. 34, (see Appellant's Brief, at page 25). In short, the Appellees' straddle-type carriers were, in every respect, a palpable infringement of Claim 4.



Taking up briefly, certain of the headline assertions of Appellees' Brief:

Page 17: Infringement in the instant case is made out by identity in purpose, operation and result between the patent and the Appellees' infringing machines.

Page 26: The patent in suit does not cover an up-movement-stop "actuated only by the load", but, covers any up-movement stop actuated by the up-movement of the load-lifting means.

Page 34: The Grab patent is included to prove actual knowledge, on the part of the Defendant, Willamette-Hyster Company, of the patent in suit.

Page 43: Infringement in the instant case is established by reason of the identity of the infringing machines with the purpose, operation, and result achieved and described by the patent in suit.

Pages 35 and 46: The accused machine has not "a substantially different mode of operation", but its *mode of operation* is identical with that described by the patent in suit.

Page 48: The language of Claim 4 cannot be properly construed so as to describe any prior art. Claim 4, clearly construed, describes directly the "accused machines".

Page 55: Claim 4 describes an invention, and the prior art in evidence is not analogous to the invention described by the patent.

Page 56: The introduction of the claim is a means for identifying the device to which the invention belongs.



Page 72: The rule governing the patenting of a new element in an old combination has no application here. There never having been, previous to Gerlinger's invention, a straddle-type carrier provided with *positive and uniformly-actuated mechanism for lifting and lowering the load-carrying shoes*, such being the finding of the Master; and since the combination, with such means of an *automatic control* limiting the lifting and lowering of the load is also new, therefore there was no prior *similar combination* to be taken into account, and Claim 4 describes a true and patentable combination.

Appellant does not find any sensible connection between the print introduced on pages 74 and 75, and the questions involved in this case.

Page 76: As evident, Claim 4 does not in any way specifically designate rack and pinion mechanism; it includes broadly, means; and such means, as already mentioned, the Master defined as "a mechanism of a positive and rigid type such as rack bars and pinions, toggle lifts, or *screw type*," the latter being the type used by the Appellees in their infringing carriers.

Page 77: The attempted reflection by Appellees on Claim 4 by consideration of proceedings in the Patent Office, both with regard to the patent in suit, and the Gerlinger prior companion patent No. 1,422,958, is entirely unwarranted. It is the language of the claim of the patent and not the discussions in the Patent Office on the subject which the court looks to. *Denominational Envelope Company vs. Duplex Envelope Company*, 80 Fed. (2d) 186 C. C. A. 4th.

The insertions in Appellant's Brief between pages 3 and 4, and between 9 and 10, are self-explanatory. The pages of the transcript from which the quotations on the chart opposite page 15 are taken are stated on the chart, and can be referred to. The quotations are excerpts only.

\* \* \* \*

In regard to the subject of *laches*, the headline on page 67 of the Appellees' brief is an incorrect statement with regard to the doctrine of laches.

The statement on page 70, that "*mere delay* unaccompanied by any change of position by defendant in reliance upon plaintiff's conduct is sufficient to cause the dismissal of the bill of complaint", is a palpable misstatement of the doctrine of laches. All authorities on the subject of laches have affirmed time and again, that the doctrine is one built on an "equitable principle which is applied to promote but never to defeat justice", as quoted in Appellant's Brief at page 64. As said in *Gillons v. The Shell Company*, mere delay unaccompanied by anything else will not ordinarily bar a suit for injunction against a naked infringer. (P. 610).

The whole tenor of Appellees' Brief on this point is a bold attempt to convert mere delay on the part of Appellant in instituting suit into an excuse for discharging Appellees from their liability for their deliberate infringement, continued after the suit was instituted, at which time the patent in suit had still nearly five years to run.

The case of *Gillons v. The Shell Company*, 86 Fed. (2d) 600, has been studied by Appellant's counsel with great attention, because it may be said to be a condensed, comprehensive treatise on the doctrine of laches.

But that decision was not intended to give, nor can any textbook, or decision give a *formula* by which the finding of laches may be worked out in all cases where the question is raised. The finding of laches by the Court is based on the *particular* facts in each case. Thus the conclusion of this Court in *Gillons v. The Shell Company* was the inevitable result of the particular facts of that case, and no similar basic facts exist in the instant case. Judge Fee, in his opinion, referred to the "*distinguishing features*" (Tr. p. 142), merely applying that case in principle. The fundamental, never variable, principle is, *the doctrine of laches is applied to promote, but never to defeat, justice.*

The Appellees by their Answer to Appellant's Interrogatories, *disclaimed any charge against Appellant* other than delay in bringing this suit. (Appellant's Brief, p. 34).

The controlling factors distinguishing the instant case from *Gillons vs. The Shell Company* briefly stated are:

In *Gillons vs. The Shell Company*, the alleged infringement was predicated on a *past* act, viz: The building and using of a process and apparatus alleged to be covered by the patent in suit. The process and apparatus were used many years before suit was instituted. The plaintiff there *knew definitely* of defendants' use of his patent, and even had charged defendant with infringing his patent; nevertheless, did not bring suit to test the



alleged infringement. Furthermore, many years before the suit was finally brought, the plaintiff there *had threatened* to sue, but did not follow up the threat by action until the 11th hour, as it were, of the patent term. Such conduct on the part of the plaintiff there justified an inference by the defendant that the threat was mere bluff; and as Judge Garrecht, who wrote the opinion, well said, "was calculated to lull the Appellee into a feeling of security."

Further, in that suit, the question of invention and priority of invention was involved, and the long interval between the defendant's alleged infringement and the bringing of the suit affected the availability of proofs on which the question of patentability and priority were to be determined. Even the recollection of the facts by the plaintiff in that suit was admittedly faulty.

No similar circumstance exists in the instant suit.

The plaintiff in that suit *did not even seek an injunction, but asked merely for an accounting* for prior infringement.

On the other hand, in the instant case:

The Appellee, Willamette-Hyster Company had actual knowledge of its infringement brought to it by its manager Gustav A. Grab,—a discharged, hostile former employee of Appellant — who urged the building of straddle-type carriers copying in principle of operation the appellant's patent, with which Grab was closely familiar.



The infringement continued *after* this suit was instituted by the building of new and further straddle-type carriers. When suit was brought, Appellant's patent still had nearly five years to run, Appellant prayed that the Appellees, *be enjoined* from further infringing of Appellant's patent, and that they be required to account for their infringement *within the six-year period* prescribed by the Statute.

Since this suit was filed October 3, 1935, the six-year Statutory period extended back to October 3, 1929.

The latter part of 1928, Appellant renewed the making and selling of its straddle-type carriers, exclusively, under the patent in suit. *In February 1929, the Appellee, Willamette-Hyster Co. first began making and selling its infringing carriers.*

There obviously was *no abandonment* of Appellant's patent nor the invention thereby protected. Appellees' Brief misuses the term "abandoned" with regard to its meaning in patent law. Appellant merely *discontinued* making and selling its straddle-type carriers from 1923 to 1928 and manufactured its hydraulic carriers instead, on which it also had a patent, because Appellant in good faith desired to give its customers, the best carrier; but the hydraulic carriers did not prove satisfactory.

In the instant case, Appellant is chargeable at most with negligence in not bringing suit earlier. Appellees' Brief does not even attempt to point to any proof of injury sustained by either of Appellees in Appellant's delay in bringing suit.

The charge of Appellant's failing to notify Appellees of their infringement is nonsense, in view of the *actual knowledge* possessed by Appellee, Willamette-Hyster Co.

Appellant seeks the aid of the Court only in the enforcement of its patent rights in the premises within the *statutory six-years' period of limitation*, which *rights Appellees violated by the making of new and further carriers AFTER suit was instituted*.

Under these circumstances the holding of this Court in the case of Graftint Mfg. Co. vs. Baker et al, 94 Fed. (2d) 369, applies; in which case this Court's previous decision of Gillons vs. The Shell Company, Supra, was both considered and applied. The Court said:

"In deciding whether or not plaintiff is barred by laches from prosecuting his suit Courts of Equity generally will follow the analogous statute of limitations". And further said, "*There must be reliance on the delay resulting in a change of position by the party asserting laches.*"

The only evidence in the instant case is that the Willamette-Hyster Company manufactured and sold over three hundred carriers up to the trial of this case, for which it received \$2,000,000.00 (Appellant's Brief, p. 38). It withheld all information as to cost of carriers, or the appurtenances for making and selling them. Presumably these carriers netted Willamette-Hyster Company a profit. There was not even an attempt on the

part of Willamette-Hyster Company to make any statement as to in what respect it suffered the slightest injury.

There is not a scintilla of evidence that Willamette-Hyster Company used anything more than normal appurtenances for making the infringing carriers.

There is not a scintilla of evidence showing any injury to the Appellee, Willamette-Hyster Company if enjoined from continuing its infringement *after* this suit was instituted.

The burden was on Appellees establishing injury, if any, since such proof is presumably in their possession, and under their control.

Appellee, Willamette-Hyster Company did not state that it would have discontinued its willfull infringement, if suit had been brought earlier. To the contrary, since Appellee, Willamette-Hyster Company defiantly continued its infringement *after* this suit was brought, the fair presumption is that it would have continued its infringement defiantly, even if suit had been brought earlier.

And the defendant, Clark & Wilson Lumber Company likewise made no attempt to show any injury which it had sustained by the delay in bringing suit, but joined the Appellee, Willamette-Hyster Company, in justifying its defiance of Appellant's patent.

Under all the facts in this case Appellant was at least entitled to an injunction enjoining Appellee, Willamette-Hyster Company against further infringement



after this suit was instituted, and for recovery for the infringement thereafter perpetrated, in accordance with the doctrine of the case of *Menendez v. Holt*, 128 U. S. 514, 524, cited by this court in the case of *Gillons v. The Shell Company*.

\* \* \* \*

Appellant submits that Appellees' Brief manifests that the evidence does not support the finding by the District Court that Claim 4, in the broad language in which written, is invalid. Hence the presumption of the judgment of the Patent Office that Claim 4 does state a true invention of a combination as written, is not overcome.

Appellant further submits that the decree of the District Court is inequitable. Although not finding Appellant chargeable with any greater fault than dilatoriness in instituting this suit, nevertheless, it completely exonerates Appellee, Willamette-Hyster Company, even for its deliberate continued infringement *after* this suit was brought. Even conceding that dilatoriness may be deemed a justification for denying recovery for infringement *preceding* the institution of suit, on the theory of an implied license, when this suit was instituted this implied license was revoked and *Appellees then became defiant infringers*, and should be held to account.

Respectfully submitted,

THEODORE J. GEISLER,  
*Attorney for Appellant.*





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IN THE

**United States Circuit Court of Appeals**

FOR THE NINTH CIRCUIT. <sup>b</sup>

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DALLAS MACHINE & LOCOMOTIVE WORKS,  
INC., a corporation,

*Appellant,*

*vs.*

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COMPANY, a corporation,

*Appellees.*

No. 9342.

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REPLY TO PETITION FOR REHEARING.

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ALBERT G. McCALEB,  
AUSTIN F. FLEGEL, JR.,  
*for Appellees.*

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## REPLY TO PETITION FOR REHEARING.

The Petition for Rehearing should be denied because

1. It makes no attempt to distinguish the Gerlinger patent claim in suit from the rule of *Hailes v. VanWormer*, 87 U. S. (20 Wall.) 353, 368, and *Lincoln Co. v. Stewart-Warner Corp.*, 303 U. S. 545, 549, upon which your Honors relied in deciding this case.

2. It merely restates once again certain contentions, with respect to the questions of anticipation and invention, which are not germane to the aggregation defense which your Honors sustained.

Respectfully submitted,

ALBERT G. McCALEB,

AUSTIN F. FLEGEL, JR.,

*for Appellees.*













